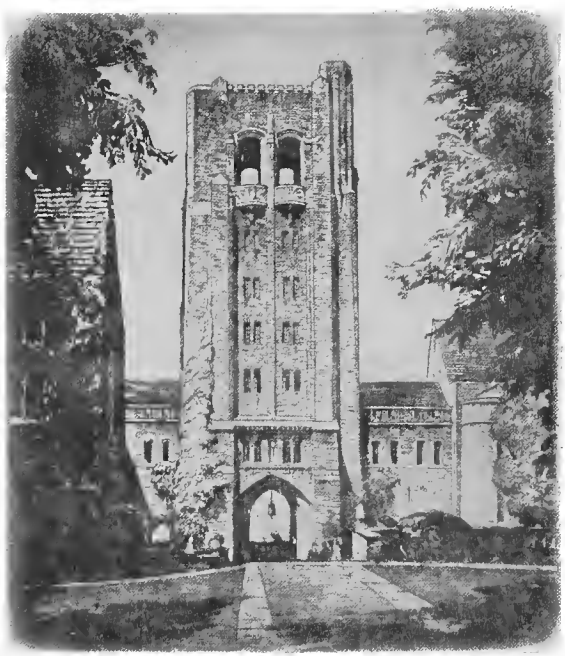

THE COMMODITIES' CLAUSE

A TREATISE

ON THE

DEVELOPMENT AND ENACTMENT OF THE COMMODITIES' CLAUSE AND ITS CONSTRUCTION WHEN APPLIED TO INTER-STATE RAILROADS ENGAGED IN THE COAL INDUSTRY

By

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TO
MY PARENTS
JAMES LATIMER AND ANGELICA REBECCA KIBLER

Erratum, page 3, line 23, substitute "Louisiana" for "Mississippi."

PREFACE.

In presenting this treatise to the public, the author wishes to acknowledge his indebtedness to the many, who, through aid in securing access to material, or suggestion, or criticism, have contribution to its preparation. He would make special mention of his obligation to Mr. Blackburn Esterline, Special Assistant to the Attorney General of the United States, for his invaluable assistance in the final work upon the manuscript. The lengthy discussions entered into developed points of view that had not occurred to the author, and the association contributed new interest and inspiration to the work. Mr. Esterline's searching criticisms and his keen insight into the broader questions of economic policy and legal propriety, have given a poise and consistency to the treatise that it must otherwise have lacked. In the initial consideration of subject matter, scope of the work, and method of approach, the author is indebted to Dr. Henry Parker Willis, at that time associated with the George Washington University and the New York Journal of Commerce, for valuable suggestion, broad-minded criticism, and a deeper conception of the function and responsibility of the investigator. Much appreciation is felt for the services rendered by Mr. Martin A. Knapp, the Presiding Judge of the United States Court of Commerce, Mr. John H. Marble, late member of the Interstate Commerce Commission, and Mr. Robert F. Broussard, United States Senator from Mississippi, for time given in conducting the public disputation in accord with the custom of the George Washington University in considering theses submitted in candidature for the Doctorate, and for their kind expressions in commendation of the work. Mention should also be made of the courtesies shown by Messrs. Edwin P. Grosvenor and George Carrol Todd, Assistants to the Attorney General of the United States; Dr. Frank Dixon, of the Bureau of Railway Economics; and Dr. Francis Walker, of the federal Bureau of Corporations. The author remembers with sincere appreciation the courteous assistance of the officials of the libraries of, Congress, the Interstate Commerce Commission, the Department of Commerce, the Geological Survey, the Department of Justice, and the Bureau of Railway Economics. He is especially indebted to Mr. L. S. Boyd, Librarian to the Interstate Commerce Commission, for his efficiency and unvarying courtesy and

patience in placing the resources of the library at the writer's disposal.

Since the completion of this work more than two years ago, a number of suits have been brought by the Department of Justice against the coal-carrying roads, several decisions have been rendered by the courts, and important investigations have been carried on, and reports made, by the Interstate Commerce Commission. This new material has received careful attention in the proper connection and has necessitated a number of changes in the original. The conclusions, however, have not been changed; on the other hand they have in many cases been materially strengthened as a result of the additional data developed by the Government and the Interstate Commerce Commission.

T. L. KIBLER.

College Station, Texas, October 1, 1915.

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THE COMMODITIES' CLAUSE

INTRODUCTION—THE PROBLEM STATED.

The marvelous capitalistic growth of the last two decades in the United States, the accumulation of vast fortunes, and the many evidences of concerted action and common motive among the financial interests, have aroused a spirit of unrest and distrust of a governmental régime under which such an unequal distribution of the profits of industry could be effected. This situation is the inevitable result of our sudden and marvelous industrial development. Legislative bodies do not generally anticipate because their constituents do not: They do not enact remedial laws until they are confronted by a condition that is insistently burdensome to the public. Then the evil is rooted, and vested interests must sometimes be rudely disturbed in order to eradicate it.

One of the most serious forms of abuse has resulted from the entrance of certain transportation companies into the businesses of manufacturing, producing, buying and selling. This practice became very common among transportation companies operating in those regions where valuable mineral properties joined their lines. Such a practice could not have immediately serious results where the interests involved extended over such wide areas as to render the concerted action of carriers, looking to monopoly control, impossible. The timber interests furnish such an illustration. The reverse situation is presented in the bituminous and anthracite industries, especially the latter, owing to the restricted area of the deposits and the dependence of carriers upon this class of traffic for the larger part of their tonnage. Such a situation renders railway control of the output of mines extremely profitable, and any affiliation between carriers and adjoining coal mines invariably results to the disadvantage of mines not so related. The simple extension of special rates and services to affiliated mines has generally been sufficient to force independents out of the business. Partial railway control of coal mines thus leads to the gradual absorption of independents, and, ultimately, to a railway monopoly of the coal industry.

The largest and only important anthracite coal deposits in the country are found in the eastern part of Pennsylvania and are confined to a very limited area. Certain railways operating in this region have acquired practical control of the production, as well as the transportation and sale, of the output of these mines. This result was accomplished through, the direct ownership and operation of coal mines; the ownership of stock in such mines; the creation and control of corporations through which the railway exerting such control might carry on operations in virtual violation of the law; the maintenance of perpetual contracts with coal companies; the interchange of officials and directors for the purpose of establishing a community of interests as a bar to competition; and the various forms of discrimination and favoritism regarding rates and services which have resulted from these relationships. The inevitable result of such monopoly control has been to choke out the independent operator, to eliminate competition, and, consequently to secure practical monopoly upon the production and marketing of coal.

The situation in the bituminous fields is in many respects similar. Such complete control, however, as exists in the anthracite fields has been rendered impossible by the wide extent of the bituminous deposits and the presence of other tonnage as a source of revenue.

There exists at present no authoritative treatment upon the conditions prevailing in the coal regions, or upon the attempts of the government to remedy or ameliorate these conditions. I have attempted to cover this field in the consideration of the following subjects: (1) The status of railway and coal-mining relationships; (2) the intent of Congress as expressed in Congressional discussion and action; (3) the application of the statute enacted and its effect upon the relationships found to exist; (4) the fundamental weakness of the Commodities' Clause; (5) an estimate of the feasibility and efficacy of the government ownership and leasing system, and the federal commission plan; and (6) amendatory legislation necessary to render the law effective.

In developing these themes, it has been thought well to bring to bear the experience of European governments with respect to their attitude toward the transportation and mining industries.

CHAPTER I

THE STATUS OF RAILWAY AND COAL-MINING RELATIONSHIPS IN EUROPE

I. The State and The Coal Industry.

The European and American governmental policies toward railways appear in striking contrast. From the very inception of railway systems in Europe, they have been consistently regarded as fulfilling primarily a public function. Evils consequent upon our failure to so regard common carriers during the earlier period of their development could never arise in Europe either under private or public ownership. It is of immediate interest to know if the problem of joint ownership and operation of transportation facilities and coal mines has arisen there; if so, its effect; and if not, why not? Furthermore what are the reasons for the present tendency among European states toward government ownership? Has this trend resulted from any objectionable relations between railways and other industries? Finally, what lessons may be learned from European experience?

We are here primarily concerned with the great coal producing countries since the temptation for railways to enter into the coal business is manifestly greater than that offered by any other industry. The United States, Great Britain, and Germany, are the great coal producing countries of the world. Together they produce about 85 per cent of the world's supply.[1] Austria-Hungary, France, and Belgium, produce nearly 10 per cent of the remainder. The entire production of Russia is little more than half that of Belgium, while the output of Spain, Italy, Holland, Switzerland, and the Balkan States, is a negligible quantity.

Nearly all the coal mines of Europe have always been operated by private corporations, independent alike of the state and of the railway. Holland has undertaken the operation of several small mines where the expense of excavating under the water is too great to attract private capital. Proposals for nationalization in

1 United States, 40 per cent (480,000,000 tons); Great Britain, 25 per cent (300,000,000 tons); and Germany, 19 per cent (227,000,000 tons). Mineral Resources of the United States, 1907.

England and France have been rejected without serious consideration. A bill introduced in the British House of Commons in 1893, providing for the state ownership of coal mines, did not come to a vote.[2] A similar bill, extended to include railways and canals, was introduced in 1907, but met the same fate.[3] Similar bills have been proposed by the Socialistic faction of the French Popular Assembly, with the same result.

Germany alone has adopted a definite policy of state control and ownership of certain important coal mines. For the most part such mines are confined to the state of Prussia. For many years small mines in the Saar District and in Upper Silesia have been owned and operated by this state. In 1902, extensive holdings were acquired in the Ruhr District. The professed object of the latter acquisitions has been, first, to break up the monopoly of coal by the great coal syndicate of Western Prussia;[4] secondly, to lower the price of coal to the consumer; and thirdly, to assure an adequate supply for state railroads. Military considerations, the conservation of coal deposits, and labor conditions, have also had some influence in determining the Prussian policy.

The "Rhenish-Westphalian Coal Syndicate in Germany is one of the most powerful, if not the most powerful, of the monopolistic combinations of Europe."[5] The Mining Administration of Prussia, in an attempt to exert an influence upon the price of coal, has recently become a member of the syndicate, with voting privilege. It now sells its own surplus from the Westphalian mines through the syndicate's selling agencies.[6] It is too early to predict the effect of this experiment upon the coal monopoly and the price of coal to the consumer.

The entrance of the government into the coal business has had no appreciable effect upon the price of coal. In fact, state coal observed the same price level as that of the syndicate until 1909 when the former was slightly reduced.[7] The output was not suf-

2 The International, Feb., 1909 (Paris and London), p. 213.

3 State Railways, E. A. Pratt (London), p. 1.

4 The Rhenish-Westphalian Coal Syndicate.

5 Statement to writer by Dr. Francis Walker, of the Bureau of Corporations.

6 Monopolistic Combinations in the German Coal Industry, Francis Walker, Publications of the American Economic Association, Third Series, Vol. V, pp. 188, 189. The writer is much indebted to Dr. Walker for this critical study of the situation in Germany.

7 Do.

ficient, however, materially to affect the retail price of coal. The German government has also endeavored, through publicity and the supervision of financial operations, to relieve the consumer from oppressive charges; but with little success. Foreign coal has from time to time been admitted at exceptionally low tariff rates and the Empire has received bids for naval supplies from English operators, in order to force down the price demanded by local dealers.[8] These activities on the part of the state seem to have had very little effect upon the price level maintained by the syndicate.

The city of Vienna, Austria, has made a somewhat similar experiment in the operation of coal mines in order to have its own source of supplies for its municipal gas works. In 1909, the city paid $2,500,000 for collieries at Ostrau, on the Austro-Prussian frontier. It has recently been proposed that the city enter into a partnership with a private concern in order that it may more advantageously dispose of the surplus not consumed in the manufacture of gas.[9] It is clear in this case that there was no desire on the part of the municipality to enter into the general business of mining and selling coal.

With the above exceptions, the business of mining and selling coal in Europe is carried on by private companies.

II. European Railways and the Coal Industry.

No case has arisen in Europe of the actual ownership and operation of coal mines by railroad companies. A single case has appeared in England where a railroad acquired a virtual monopoly upon the purchase and sale of the output of certain coal mines. The situation presented is little less serious than that resulting from actual ownership and operation. In 1854, by special Act of Parliament, the Great Northern Railway secured control of a short line of the Abergate Company, which latter extended into the Nottingham coal fields.[10] No sooner had this been accomplished than the railroad set about securing a monopoly upon the purchase and sale of the output of mines served by the Abergate line. This was effected through the control of local purchasing agencies and the creation of selling agencies in the London mar-

8 Monopolistic Combinations in the German Coal Industry, Francis Walker, Publications of the American Economic Association, Third Series, Vol. V, pp. 188, 189.

9 The International (Paris and London), p. 213, Feb., 1909.

10 History of the Great Northern, Chas. H. Grinling, pp. 143, 144.

kets to receive and dispose of all shipments from these mines. By 1857, the scheme had worked so effectively that the coal operator was unable to dispose of his output except through the railway's agencies. At this time about 96 per cent of the entire output was sold to the Great Northern prior to shipment. In December, 1857, upwards of 700,000 tons were so purchased, transported, and sold by the railway; whereas but 28,000 tons were received and transported for the coal companies.[11] It further appeared that one man, acting as agent for the railway, controlled the purchase of the output of the Nottingham mines and that operators were compelled to part with their coal at the agent's prices, or else they were unable to secure transportation facilities.[12]

Various subterfuges were employed to mislead the public as to the real purport of these transactions. The railway maintained that it was not purchasing the coal prior to receiving same for shipment but that the agents in London and intermediate points were in fact representing the operators. It was shown, however, that certain mining operators had been required to go through the form of appointing an agent to market their products although such "agents" were in fact acting under specific direction from the railway company, occupying the latter's offices, and otherwise identifying themselves with the railway management. In many cases where it was attempted to establish the bona fide nature of these arrangements, it was clearly proved that the railway had bought outright the shipments in question before they were transported to market.[13]

The government contended that the act creating the Great Northern Railway did not empower it to trade in coal or employ its funds in any other manner than for "ordinary purposes of making and maintaining the railway, that is, the ordinary power of a railway company, and no other; .....that.....the compay had applied and was applying the funds of the company, to a large amount, in purchasing coal from coal owners and selling it at London and at intermediate stations on account of the (r. r.) company.....as coal merchants with a view to profit, on a most extensive scale, in competition with the coal merchants whose coal

11 The Attorney General vs. The Great Northern Railway Co., Law Journal Reports 38, Pt. 1, New Series 29 (Equity) 1860, pp. 794, 795.

12 Same as (10), p. 143.

13 Same as (11), pp. 794, 795.

they carried under agreements still in force."[14] The government declared that "the effect was to enable the company to monopolize the market for sales; that their cost of carriage was a very large element in their favor charged to the consumer of coals; and the discretion the company had of varying such cost, and the facilities of station accommodation at their command, had placed freights at so great a disadvantage as, practically, to exclude them from the market."[15]

Vice Chancellor Kindersley, delivering the opinion of the court, granted the prayer of the government for an injunction forbidding the railroad company to continue the business of buying and selling coal. The Vice Chancellor said:

> "I observe that in the eight years from 1850 to 1857 inclusive, the amount of their coal business has increased from 73,000 tons to 794,000 tons; and there is no reason, as the affidavits show, why they should not—there is great danger that they may—get into their hands the entire business in the coal of that district of the country. If they can do this with regard to coal, what is to prevent their doing it with regard to every species of agricultural produce all along the line? Why should they not become purchasers of corn, of all kinds of beasts, and of sheep, and every species of agricultural produce, and become great dealers in the supply of edibles to the markets of London; and why not every other species of commodity that is produced in every part of the country from which or to which their railway runs. I do not know where it is to stop, if the argument of the company is to prevail. There is therefore great detriment to the interests of the public, for this reason, taking merely the article of coal.....The whole question is involved in this: That by reason of the monopoly.....the mischief to the public arises, and from that species of monopoly which is attempted to be acquired by this company. The reason why it is unlawful to do it .....is, the danger of monopoly."[16]

The government therefore succeeded in establishing, (1) that the road in question was dealing in coal for a profit; (2) that such transactions were illegal because the act creating the railway corporation did not authorize the road to enter into the pur-

14 Attorney General vs. Great Northern Railway Co., Law Journal Reports, 38, Pt. 1, New Series 29 (Equity), 1860, pp. 794, 795.

15 Do. p. 795.

16 Do pp. 801, 802.

chase and sale of commodities, the court maintaining that a prohibitive statute was not necessary to render such operations illegal; and (3) that the Attorney General may on his own initiative or at the instance of an individual file an information to restrain such proceedings on the part of any common carrier, no particular act of Parliament being necessary.[17]

The issue in the Great Northern case was so clearly presented and so squarely met that we do not find the recurrence of a similar attempt on the part of any English railway to control the coal business. England has always allowed greater freedom to her railways than any other continental country.[18] This may explain in a measure the early aggressions of the Great Northern. The same situation could not have arisen on the continent on account of the very intimate relation that has always existed between the state and the railway; nor is it likely to recur in Great Britain owing to the effect of this decision in defining and limiting the privileges of a common carrier, or of any corporation, to the specific purpose for which it was chartered.

III. Conditions in Europe Restraining Joint Operation.

1. **Waterways.**—The mining industry in all the European states became very thoroughly established before railways entered the field. It was never necessary for operators of coal mines to build railroads in order to market their product, since practically all the great coal mines of Germany, France, England, and Belgium, are located on navigable rivers.[19] As early as 1875, Germany carried 19,600,000 tons of freight upon her 5,625 miles of navigable water. By 1900 this traffic had grown to 72,200,000 tons, exclusive of ocean-bound traffic.[20]

The great coal mines of western Germany are conveniently located on the Rhine, the Moselle and the Saar Rivers. Other smaller mines in central Prussia have natural or artificial water courses connecting with greater water-highways; and the valuable state mines of eastern Prussia are on the Oder River.

Furthermore the great manufacturing centres of Germany are

17 Attorney General vs. Great Northern Railway Co., Law Journal Reports 38, Pt. I, New Series 29 (Equity), 1860, pp. 798-800.

18 Moody's Magazine, Vol. 7, p. 337.

19 Canals and Navigable Rivers of Germany, Doc. I, 1909, National Waterways Commission.

20 Do. pp. 1, 2.

connected with each other or the sea by navigable rivers or canals. The Weichsel flows from Warsaw to the Baltic reaching the seaports of Königsberg and Danzig; the Oder with its numerous tributaries navigable from southern Silesia, and even Austria, extends to the harbor of Stettin on the Baltic; the Spree and Havel, connected by canals with the Elbe and Oder, furnish Berlin and the outlying populous manufacturing districts with adequate facilities for the transportation of heavy freight; the Elbe flows directly through the entire German Empire, and, with its several branches, unites the commercial interests of Saxony, Magdeburg, Dessau, Dresden and Leipsic, affording each an adequate outlet to the Baltic by way of Hamburg; the Weser, with its branches, the Aller, Leine, Werra and Fulda, connect all of west central Germany with the port of Bremen; and the Rhine, with its branches, the Main, Ems and Mosel, extending from the northern border of Switzerland to the port of Rotterdam, completes the marvelous system of navigable rivers with which this country is supplied.[21]

France is not quite so well supplied with rivers as Germany, but what is lacking in natural facilities has been supplied by an extensive system of canals and highways reaching every part of the country. This policy was inaugurated by Louis XIV, and was developed so rapidly that almost a perfect system of lines of communication was established long before the introduction of railways.[22]

The railways of Belgium and Holland, for freight purposes at least, are even to-day considered as mere auxiliaries to the canals. The water routes of Holland now carry about 90 per cent of the traffic. Steamers from Amsterdam deliver freight to all the leading Dutch cities in twenty-four hours, or less.[23] The water facilities of Belgium are almost equally good.

The valuable coal fields of England in the counties of Derby, York, Durham, New Castle, and Nottingham, as well as those in Southern England and Wales have ready access to the sea by way of the Trent, Humer and Severn Rivers, and to London, Liverpool and other great manufacturing centres, by sea routes.

21 Canals and Navigable Rivers of Germany, Doc. I, 1909, National Waterways Commission.

22 Railways of Europe, Moody's Magazine, Vol. 7, p. 260.

23 Do. Vol. 9, pp. 47-50.

The situation throughout all the European states is very similar. If they do not possess sufficient natural water systems they have in the course of centuries before the introduction of railways perfected their systems of canals and public highways. Through one means or another it is a fact that nearly all the great coal mines of Europe had easy access to local manufacturing towns and to the great sea highway, connecting them with all the centres of Europe, long before railways were introduced.

In the earlier development of the systems of transportation in Europe, the rivers usually afforded through routes; whereas state highway lines, whether privately or publicly owned, were generally limited by state borders. This advantage together with the smaller cost of operation rendered water routes less expensive and more convenient. The force of this reasoning is all the more apparent when the comparatively small area of European countries is considered.

As a result of these conditions, the transportation of heavy, low-priced freight by water is so much cheaper and more convenient that the bulk of such freight has always reached its destination by this means in spite of the highly developed railway systems now in operation. Railways were, therefore, not necessary to the early development of coal mines and the necessity, or even the temptation, of uniting the interests in order to develop the one or the other, did not exist.

2. **State Railway Policies.**—We have presented above the natural forces which rendered the development of the coal industry practically independent of the railway. We come now to the declared policy of the European states toward the construction and operation of railways, a policy that has operated powerfully to confine transportation facilities to the business of common carriers. The European governments from the beginning have taken a strong hand in the administration of their railway systems. The theory that common carriers are creatures of the state and subservient to the interests of the public, has been at the bottom of all railway legislation. This attitude may be partially explained by the fact that the railway has always been regarded, not as a substitute for the canal and public highway but merely as supplementary thereto. In general, therefore, the laws applying to the old public highway were adjusted to the administration of railways.

a. English Railways and the State.—English railways, as has already appeared, enjoyed much greater freedom than those of the continent. Construction and operation were carried on independently of the state, the only restrictions being such as the common law applied to all corporations and to all common carriers.

The larger part of railway mileage in Great Britain has been laid by local promoters without any state aid whatsoever. For the most part the original lines were very short and controlled by as many different financial interests. The Great Western, for instance, is composed of what were originally nearly two hundred smaller companies, yet its total length is but 2,736 miles. Even to-day the railway mileage of the country is controlled by about 250 separate and independent companies, although there is a total of only 22,600 miles of railway in the islands.[24] About twenty companies, however, control the larger part of this mileage.[25]

During the earliest development of English railways the policy of the government was very clearly defined and incorporated into law. The state did not interfere with free and unhampered development so long as railways confined themselves to the operations of common carriers and served the public with proper equipment and at fair and reasonable charges. As far back as 1842 there was a strong sentiment for public ownership but this agitation appears to have arisen on account of the unusually large number of accidents that had recently occurred,[26] and was of short duration. About 1845 there was much criticism on acount of the alleged high charges for transportation. At this time a very stringent statute was enacted giving the Board of Trade the most arbitrary power respecting rates, services, and profits. This body might reduce the rates designated by Parliament, but could not raise them; might restrict profits to ten per cent by reducing rates, and, at the end of fifteen years, might actually purchase all railways if such procedure were deemed advisable.[27] This lat-

24 The Ways of Our Railways (London), Chas. H. Grinling, p. 2.

25 Do. p. 4.

26 History of (English) Railways, 1820-1845, J. Francis, Vol. 2, pp. 36-40.

27 "If after 15 years any new railway shall yield 10 per cent for three years, the Board of Trade may, on one month's notice, reduce the tolls and fares, according to their judgment so as to keep the profits at 10 per cent." J. Francis, Vol. 2, p. 99. The board was also authorized to lower

ter provision was amended to apply only to future railway construction.

All charters issued to railway corporations confined their operations specifically to service as common carriers. The attempt on the part of the Great Northern to branch out into the mercantile business was checked immediately and on account of England's general policy and its rigid application in this case, her railways have made no further attempt to enter into other lines of business.

b. German Railways and the State.—From the period of early railway construction in Germany the states took an active part in their establishment and regulation. Although concessions were first granted to private companies, it was always clearly specified that the state might take over such roads if it saw fit. We may pass over the period from 1838 to 1847 when the larger part of the German railway system was in the hands of private companies, and when no aid was given by the state to encourage railway construction.[28] In the latter year the Prussian Diet inaugurated the policy of guaranteeing 3½ per cent interest on capital invested, provided that profits in excess of 5 per cent should be distributed as follows: (1) to repay the state for guarantees advanced; (2) to create a fund from which further advances might be made when earnings fell short; and (3) to purchase shares of railway stock for the state. During this period the state also bought shares of stock outright in order to stimulate development.[29]

From 1848 Prussia exercised exceedingly strict supervision over railway time tables, tariffs, and even the appointment of certain officials. The state also reserved the right to take over any lines which had required the guarantee three years in succession. Practically the same conditions existed in other German states.[30]

A distinct policy of nationalization was not inaugurated until after the Franco-Prussian War. Under Bismarck's influence, a comprehensive plan for uniting the interests of all the German states was inaugurated. He proposed nationalizing all railways

rates below those authorized by act of Parliament but "in no case to raise them," and the board at the end of 15 years might, "if they think fit, purchase the railway." Statute of 1845.

28 Moody's Magazine, June, 1909, p. 429.

29 (English) Railways and their Rates, E. A. Pratt, p. 243.

30 Moody's Magazine, Vol. 7, p. 429.

throughout the Empire, whether such railways were owned by private corporations or German states. This plan had for its prime object the uniting of all the states in order to establish a powerful, aggressive and harmonious nation.[31] The policy contemplated uniformity of rates, reduction of rates, adjustment of equipment to military needs, and fostering of native industries by giving the Empire control of export and import tariffs.

The constitution under Prussian influence, authorized the Empire to require all the German states to construct lines where strategic conditions demanded it, and to control rates on such lines. To facilitate administration the Empire created the Reichs-Eisenbahn-Amt,—an executive council to bring under central control all questions regarding transportation affecting the Empire, and to secure, as far as possible, uniformity in state railway legislation and administration. The government, however, did not possess power to make this policy effective.[32] It failed because the other German states were too fearful of Prussian domination to become parties to the Bismarckian policy.

Prussia then proceeded to apply the policy locally, taking over practically all the remaining private lines in her own state and such adjacent lines as she could secure. In 1896 all the Hessian lines were brought under Prussian influence. By 1899 the nationalization of the German roads was complete, Baden, Saxony, Bavaria, and Würtenburg, following the Prussian policy in order to prevent further Prussian aggressions.[33] By 1900 Prussia owned and operated 16,725 miles of railway in her own borders and 2,127 outside, the total constituting about two-thirds of all German railway mileage.

In considering the German policy it must be remembered that the railroad is primarily military in character, and secondarily, an instrument in the hands of the state for the building up of internal industries. These considerations render it entirely different from the principles governing railway construction and operation in the United States; hence the absolute lack of certain peculiar evils growing out of the nature of our own system.

c. **French Railways and the State.**—The French railway system may be regarded merely as an extension of her highway and

31 Moody's Magazine, Vol. 7, pp. 429, 430.
32 Do. p. 430.
33 Do. Vol. 8, p. 29.

canal system. The same system of strict control and supervision has been applied. It has been against the French policy, however, to own and operate railways as state institutions. In this respect the French system stands midway between the independent railway of Great Britain and the state railway of Germany.

From the very beginning of railway construction in France we may discern the strong supervising hand of the government. The entire railway plan for the country was originally worked out by state engineers to supplement other methods of transportation. This was before it was decided whether the roads were to be publicly or privately owned.[34] It was then thought advisable to permit them to be owned and operated by private interests, the state agreeing to pay liberal subsidies as an inducement to the investment of private capital.

The first actual attempt at railway construction was a private line from Paris to Orleans. Work was begun in 1839 but the company was unable to raise sufficient funds to complete the project. The state then came to its aid, offering to guarantee interest on all capital invested, and the road was completed without further difficulty.[35] The state then adopted the policy of advancing one-third of the capital for approved undertakings for which three per cent interest was charged.

In 1842 an extensive policy of state construction was agreed upon, the state undertaking to build earth works, bridges, and stations, while the companies receiving concessions laid the rails and provided the rolling stock. The road so constructed was ultimately to revert to the state, in which event the equipment would be purchased at a reasonable valuation.[36]

From 1842 to 1852 a number of small lines were built on this plan. By 1857 all the railway mileage had been consolidated into six big systems. At this time so much public criticism was elicited on account of the state's expenditures in the construction of extensive branch lines that the state policy was changed from that of subsidizing to the guaranteeing of interest on capital invested for new lines.[37]

34 The Railways of France, Moody's Magazine, Vol. 7, p. 260.

35 L'Economiste, Leroy-Beaulieu, Dec. 2, 1911.

36 Report to (English) Board of Trade on Railways in France, 1910, p. 115.

37 Do. p. 116.

From 1859 to 1883 the state guaranteed 4.65 per cent on private investments.[38] During the latter four years of this period the state expended about three and one-half milliards of francs in new railway construction. This policy was discontinued in 1883 on account of the stringency in state finances.[39] The state then entered into an agreement with the six great systems of the country. This compact provided "that the state should confine its own railway operations to the small district in the southwest occupied by what is known as the state line, and that isolated lines which the state owned in various parts of the country should be taken over by that one of the six great companies in whose territory it lay;[40] secondly, that additional lines as needed should in the future be constructed only by the companies in whose districts they lay; thirdly, that the state should guarantee each company a minimum dividend and that when the amount available for dividends exceeded a certain percentage—the rate differing for each line—two-thirds of the excess should go to the state." It was further agreed that the state should bear any expense incident to special modification of structure for military purposes. The agreement was signed by the State Minister of Public Works, and the six companies, respectively.[41] It simply extends, and more clearly defines, the French policy of granting railways a monopoly in their respective districts; and shifts the policy of a guarantee of interest on capital expended, and the financing of railway construction, to that of a guarantee of dividends with the reservation of a portion of the excess to the state.

From the earliest railway construction in France, that government has uniformly contended that railways should be operated under non-competitive conditions but under strict state supervision. This policy is well illustrated in the experiment of 1865, giving municipalities the power to grant subsidies to local roads which were to be operated independently of the six great com-

38 Report to (English) Board of Trade on Railways in France, 1910, p. 116.

39 Do., pp. 116, 117.

40 The total extent of such lines was about 1,860 miles. This mileage represents the accumulation of state constructed roads, that were not taken over by private companies, from 1876-1911. Leroy-Beaulieu, Railway Age Gazette, May 10, 1912, pp. 1047-1049.

41 The French Railway System, Moody's Magazine, Vol. 7, p. 261; also Report to (English) Board of Trade, 1910, p. 144.

panies. It was clearly stipulated that the roads constructed under this arrangement were to be feeders, and not competitors.[42] Later the lines combined in certain sections of the state and entered into competition with the great systems. The government took the matter in hand and empowered the systems, whose monopoly rights were regarded as being infringed upon, to buy out all such municipal enterprises.

As in England and Germany, parallel lines have never been permitted in France, nor have any conditions tending to competition been encouraged. The six railway systems of France have always maintained a complete monopoly of traffic in their respective territories. The government has reserved the right, however, to grant concessions to rival enterprises if conditions in any section seem to justify it.[43] This policy has resulted in the elimination of rate wars, as well as improperly considered lines for speculative purposes.

There appears to have been no significant agitation in France for the state ownership of railways. This is probably due to the fact that the very close relations sustained by the state to railway construction and administration have enabled the government to exert about as much control over transportation as if it owned and operated the system throughout. The recent purchase by the state (1908) of the Western Railway, extending from Paris to Dieppe, Le Havre, Brest, and St. Nazaire—a distance of 3,730 miles—is not regarded by the leading authorities as indicating a change in the state policy towards railways. Messrs. Reyntiens and Chute, who have made a very careful investigation at the instance of the British Board of Trade, state that the Western was taken over by the French government because the former became so deeply indebted to the state for advances that there was no hope of its ever paying out.[44] It is maintained by some investigators, however, that the Socialists regarded the Western as the best prospect for the introduction of their policy of state ownership and operation, and that the government was forced to yield to the pressure brought by this faction for the purchase of the road.[45] This addition to the short lines hitherto operated by the

42 The French Railway System, Moody's Magazine, Vol. 7, p. 261.
43 Do. Vol. 7, p. 261.
44 Report to (English) Board of Trade, 1910, pp. 136-140.
45 Same as (42), Vol. 7, p. 265.

government brings the state mileage up to a total of 5,600 miles, about 8 per cent of the total railway mileage of France.[46]

d. Austro-Hungarian Railways and the State.—The first Austrian railway law provided for concessions to private companies and guarantee of interest on capital invested. As appears to have been the case in other European countries, this method of guarantee was necessary in order to draw out private capital. Early railway laws likewise limited dividends and prohibited the construction of parallel lines.[47]

The plan of guaranteeing dividends was not entirely satisfactory and the state was compelled to build a number of lines where private capital would not undertake it. About 1865 the financial condition of the Empire became so critical that it was compelled to dispose of a large part of its railway properties to private capitalists, the important lines extending from the centre of Austria to Hungary, and another from the centre to Bohemia and Moravia, going to French capitalists. British and French interests secured control of the Southern Railway, a line extending about 1,000 miles, with an annual revenue of over $9,000,000. This gave French and English capital control of the three leading lines of the Austrian Empire at a time when they were most necessary in the plan to unite the diversified commercial interests of that country.[48] When the financial stress was removed the Empire began buying in shares until a sufficient number were secured to control the policy of the road in question. It is understood, however, that full control of the Southern has not yet been secured.

Private railway enterprise continued until 1873. At this time a very complicated situation had developed. Many lines had been built purely for speculative purposes; intense antagonism had developed between private and state systems; and bitter competition arose between the Danube River and canals on the one hand, and railways on the other. The Empire determined upon a policy of nationalization as the only means of removing these unwholesome conditions. Liber, in summing up the reasons for this action, says: "Nationalization is intended to bring the financial

46 Calculated from tables appearing in Railway Age Gazette, May 10, 1912, pp. 1047-1049, Article by Leroy-Beaulieu; also Report to (English) Board of Trade, 1910, p. 141.

47 (a) The International (Paris), Vol. 4, p. 110; (b) The Railways of Austria-Hungary, Moody's Magazine, Vol. 8, pp. 291-297.

48 The International (Paris), Vol. 4, p. 111.

views of the State Railway administration into harmony with the commercial needs of the population; further, to provide in case of necessity for an adjustible offset to tariff charges; and finally to remove serious technical difficulties of management and traffic resulting from the simultaneous existence of private and state lines."[49] He adds, however, that state administration is not designed to reduce charges but that it will result in increasing wages and shortening working hours; that consequently rates may be somewhat increased though made more uniform.

The policy of nationalization proceeded slowly in Austria, but more rapidly in Hungary. By 1898 about half of all the railways in Austria were owned and operated by the state; and about two-thirds of those in Hungary.[50] By 1909 more than 82 per cent of all the railway mileage in the Empire had been taken over for operation by the state.

e. Belgian Railways and the State.—In the absence of private initiative, Belgium inaugurated a system of state roads in 1834. The principal motive seems to have been the hope of securing to Belgium a portion of the trans-continental traffic that had been moving through the rivers and canals of Holland. State construction, however, moved very slowly, owing to the vigorous competition of the Dutch and Belgian waterways. By 1840, but two hundred miles had been completed.[51] The state then held up further construction on account of inability to compete with the waterways.[52]

Private capital began to be invested in railways in 1842, some of the lines being operated by the private companies building them, and others by the state. By 1870 private railway mileage had reached 1,510 miles, whereas state roads had little more than one-third as much. Rate wars soon began between the two systems. The situation was further complicated by the fear that foreign capitalists, especially those of Germany, were getting a hold upon the Belgian railway system. For the purpose of securing uniformity of rates and of eliminating possible foreign control, the government resumed its former policy of state ownership and operation in 1870. By 1905, it had secured absolute

49 The International (Paris), Vol. 4, pp. 112-114.

50 The Austria-Hungarian Railway System, Vol. 8, p. 291; Vol. 7, pp. 259-270.

51 State Railways (London), E. A. Pratt, p. 287.

52 Report to (English) Board of Trade, Mervyn L. Chute, 1910.

control of over 2,500 miles, the remaining 280 miles being still owned and operated by private companies.[53] It is understood that the entire mileage has now come under state control.

f. Dutch and Danish Railways and the State.—The railways of Holland and Denmark have had practically the same history as those of Belgium. The situation with respect to water competition, the lack of private initiative, trans-continental traffic, and the fear of foreign control, was comparable to that in Belgium. Holland now operates 940 of her 1,600 miles of railway, the remaining 660 miles being privately operated. The state, however, owns 205 miles of the latter lines, for which it receives a rental, and a division of all profits over five per cent.[54]

g. Italian Railways and the State.—Prior to 1870, Italian railways were operated by private companies. At this time, as an aid to the unification of Italy and for the more specific purpose of shutting out Austrian capitalists, the government began buying up certain northern lines. By 1885 a majority of all Italian roads had been so taken over. Dissatisfaction led the state to charter four private companies to take over the entire rolling stock upon an agreed valuation, the state retaining title to the lines, and to divide the revenues accruing with the government. The state reserved the power to fix rates and supervise the system. Leases were granted for sixty years, either party having power to terminate the same after twenty or forty years.[55]

In 1905, marking the close of the first twenty-year period, a bill was passed by which all the railroads of the state were nationalized. This action appears to have been based on the allegation that the modern social and industrial conditions demanded that the state administer the entire railway system. The movement was fostered by the socialists on the ground that labor conditions would be improved under state control.[56]

h. Other European Railways and the State.—The state railways of Russia now constitute about three-fourths of the mileage of that country. Owing to the vast distances, navigable rivers and good systems of canals connecting rivers with each other and

53 State Railways (London), E. A. Pratt, pp. 287-289.

54 (a) The Railways of Holland, Moody's Magazine, Vol. 9, pp. 47-50. (b) State Railways, E. A. Pratt, p. 22.

55 (a) Report to (English) Board of Trade, 1910, pp. 220-258. (b) The Italian Railway System, Moody's Magazine, Vol. 8, pp. 189-196.

56 The Italian Railway System, Moody's Magazine, Vol. 8, pp. 195-196.

with the sea, extremes of climate rendering railways inoperative in some sections at certain seasons of the year, and formidable engineering obstacles, private capital has never entered largely into the building of railways in Russia. For these reasons and for military purposes, the government has undertaken the larger part of the work, the trans-Siberian line alone, opened in 1905, extending over 6,177 miles. The state seldom realizes a sufficient amount to cover cost of operation and interest on capital invested.[57]

All the railways in Spain are owned and operated by private companies. The government maintains about the same relation to such enterprises as we have shown to exist in France. The roads are to revert to the state after 99 years.[58]

About two-thirds of the railways in Portugal are owned and operated by private companies, the remaining one-third, about 500 miles, being owned and operated by the state. With respect to water competition, the situation in Portugal is very similar to that in Holland, Belgium and Denmark.[59]

The Swiss system was taken over by the state in 1898 on a referendum by the people.[60] The arguments advanced by the Federal council for public ownership as quoted from the Botschaft des Bundesrates an die Bundesversammung vetreffend den Rückkauf der Eisenbahnen vom 25 März 1897, are as follows:

> 1. To consolidate the independent railway lines of Switzerland, (a) to save expense of so many company and managers' offices; (b) to secure advantages of monopoly and organization on a larger scale in equipment and maintenance of way, in operation and security of traffic; and (c) to improve local service by utilizing a larger part of the profits from certain sections of the state for the development of the less prosperous sections;
> 2. To reduce fixed charges by substituting the credit of the government for that of the private companies;
> 3. To apply profits to the amortization of capital until the entire original system should be owned clear of debt;
> 4. To abolish all kinds of discrimination;
> 5. To more effectively represent the interests of shippers and the travelling public;
> 6. To improve the condition of employees;

57 The Russian Railway System, Moody's Magazine, Vol. 8, pp. 105-112.
58 The Spanish Railway System, Moody's Magazine, Vol. 9, pp. 133-134.
59 The Portugese Railway System, Moody's Magazine, Vol. 9, p. 207.
60 The Railway Library (London) 1911, W. M. Ackworth, p. 167.

7. To eliminate foreign influence as dangerous to the political interests of the state.[61]

Switzerland has combined the economic, the social, and the political, in her scheme of nationalization. This policy is in harmony with the ambitious policy of that country to place all public service corporations of whatever description under strict state control and operation.

i. **Summary.**—Briefly summarizing the above, it appears, (1) that, with the exception of certain state mines in Germany and Holland, and municipal mines in Vienna, all coal mines in Europe are now under private control; (2) that there is now no affiliation between European railways and coal mines, nor has there ever been with the exception of the isolated case of the Great Northern in England; (3) that the peculiar conditions in the United States tending to joint operation have not existed in Europe, and that any tendency in this direction has been offset (1) by a well developed system of natural and artificial waterways, which are more convenient and economical for transporting heavy freight, and which were in successful operation long before the introduction of railroads; (2) the clear and tacit understanding that the operations of railways be confined to the business of common carriers; and (3) the very close relation existing between the state and all railway enterprises, such as the guaranteeing of interest paid in construction, close supervision of operations, and the reserved power to take over at any time, or on the expiration of concessions. In no case does it appear that the trend towards public ownership bears any relation to the possible activity of railways in other industries; so also the problem of joint ownership has been just as effectually avoided by the European governments under periods of private ownership as under public ownership.

61 Abstracted from translation in Quarterly Journal of Economics, Feb., 1912, pp. 343-345.

CHAPTER II.

THE STATUS OF RAILWAY AND COAL-MINING RELATIONSHIPS IN THE UNITED STATES.

I. Earlier Railway Legislation.

It is not within the scope of this treatise to go into earlier legislation dealing with alleged corporate abuses further than to establish a proper basis for considering the problems immediately before us. State legislation on this subject preceded that of the federal government. This naturally resulted from the local nature of the evils to be remedied. The development of commerce between the states turned these local problems into national problems beyond the reach of state laws. Then it was that the federal government entered the field of regulation.

A brief resumé of state and federal laws prior to the enactment of the Commodities' Clause will suffice: The so-called Granger states[1] first enacted positive laws against the various forms of discrimination alleged to exist. None of these restrictive statutes, however, were aimed directly at the evils growing out of the entrance of railways into other lines of business.

During the period when the agitation in the Granger states was at its height, the State of Pennsylvania incorporated into its constitution a section designed to confine the operations of railway corporations to the business of common carriers. It provided that,

> "No incorporated company doing the business of a common carrier shall, directly or indirectly, prosecute or engage in mining or manufacturing articles for transportation over its works; nor shall such company, directly or indirectly, engage in any other business than that of common carriers, or hold or acquire lands, freehold or leasehold, directly or indirectly, except such as shall be necessary for carrying on its business; but any

1 Illinois, Wisconsin, Iowa, Minnesota, and Nebraska. a. Constitution of Ill., 1870, Art. 11; and statutes, 1871-1872. b. Potter Law of Wis., Laws of Wis., 1874, p. 599 (compilation). c. Laws of Ia., 1874, p. 26; 1878, p. 33 (compilations). d. Laws of Minn., 1871, p. 89 (compilation). e. Constitution of Neb., 1875, Art. 12, p. 620.

> mining or manufacturing company may carry the products of its mines and manufactories on its railroad or canal not exceeding fifty miles in length."[2]

The courts of Pennsylvania, unfortunately, construed this clause as applying only to future acquisitions; and even as thus interpreted it was not rigidly enforced as will later appear.

The legislature of the State of West Virginia, a number of years later, enacted a similar measure, though somewhat narrower in its scope, presumably designed to effect a separation of the business of transportation from that of buying and selling coal. The statute declared it unlawful,

> "for any railroad company to engage directly or indirectly in the business of buying or selling coal or coke, or to promise, pledge or lend its credit money or other property or thing of value to another, either natural or corporate, engaged in such business; but nothing herein shall prevent such corporation,.... when it is the owner of any such commodities, from selling and shipping the same."[3]

It may be very clearly seen that the latter clause negatives, in large degree, the prohibitive force of the statute.

This agitation and the resulting statutes and constitutional amendments to meet the purely local problems were reflected in the National House of Representatives, and later in the Senate, by resolutions and bills designed to extend the principles locally applied to commerce between the states. None of these proposals, however, were directed against the entrance of transportation companies into other businesses.

The situation with regard to the regulation of inter-state commerce reached a critical point in 1886 when the Supreme Court rendered a decision confining the jurisdiction of state legislatures to the limits of the respective states.[4] The rapid development of our railway policy is indicated by the fact that this decision reversed the attitude of the Supreme Court as expressed in a

2 Constitution of Penn., Art. XVII, Sec. 5, adopted Nov. 3, 1873; effective Jan., 1874.

3 Statutes of W. Va., Sec. 66b, Chap. 54, Code of 1899.

4 Wabash R. R. Co. vs. Ill., 118 U. S. 557 (1886). Here the Supreme Court said, "If the Illinois statute could be construed to apply exclusively to contracts for a carriage which begins and ends within the state, disconnected from a continuous transportation through or into other states, there does not seem to be any difficulty in holding it to be valid."

leading case ten years earlier. The latter decision laid down, for the first time, not only that a state is supreme regarding the regulation of public service corporations wholly within the state, but that such legislation may also affect inter-state commerce as respects the particular state involved and other states in the absence of federal legislation.[5] The opinion expressed in the later case, however, has now become firmly established as the law of the land, and has been confirmed and extended by later decisions.[6]

The day was thus fairly cleared for federal action, and the limitation placed by the courts upon the power of states to regulate commerce, rendered such action imperative. Congress responded promptly in the enactment of the interstate commerce statute of 1887. This measure was comprehensive as regards rates, discriminations, and services, but did not attempt to settle the question of the ownership and operation of the sources of raw materials by common carriers. As a matter of fact the question was barely touched upon in the elaborate investigation and report of the Senate Committee prior to the enactment of the statute.[7]

A number of amendments were subsequently made to the original federal inter-state commerce law, but the issue presented, on account of the ownership by railways of vast mining properties, was not fairly faced prior to the consideration given it pending the enactment of the Hepburn Law of 1906.[8] Perhaps the federal law of 1890, known as the Sherman Anti-trust Law, would have been more effective in restraining railway-coal combines if it had been applied before the railroad monopoly had become so firmly intrenched; but a decision of the Interstate Commerce Commission in the so-called Haddock and Coxe cases es-

5 Munn vs. Ill., 94 U. S. 113 (1876).

6 Ex parte Young, 209 U. S. 123. The court here held that the federal government may regulate rates wholly within the state to insure the rights of property; and, "Minn. Rate Case," 5 Fed. Rep. 184 (Concurred in by S. C.), where it was held that the federal government may not only so regulate intrastate rates under the 14th Amendment, but may also regulate such rates if they interfere in any way with the federal regulation of interstate commerce.

7 Report of the Senate Committee on Interstate Commerce, submitted January 18, 1886, p. 180.

8 A bill was introduced by G. D. Tillman (H. R. 12654, 49th Cong., 2d Sess.) "to prevent the combination of carrying interstate commerce with other business.....and to prohibit the consolidation of parallel or competing lines of interstate commerce carriers." No action was taken.

tablished an unfortunate precedent by recognizing the railways involved as "possessing the commingled attributes of carrier and producer."[9] This assumption seems to have been considered by the courts as barring action against such relationships pending more specific legislation.[10] The tacit consent and approval of the Inter-state Commerce Commission to the relation existing between certain carriers and coal mines was regarded as practically estopping the application of the Sherman Anti-trust Law, not only to restraints of inter-state trade on account of agreements between railways but also as between railways and other producing concerns.

II. Development of the Coal Problem.

A careful study of the situation leads to the belief that remedial legislation was so long delayed on account of the very complexity of the relationships involved and the fear that really effective laws would lead to widespread disaster. Then, too, the very interests themselves were bringing strong pressure against any such legislation. Industrial panics were held up as a threat to prevent the enactment of laws that would cut asunder relationships so strongly intrenched in our industrial system.

It may also be said that the harmful results of railway control of adjacent producing concerns was not fully grasped by the public at large. It is especially true that the mining industry in this country grew up hand in hand with the transportation industry. Whenever large mining properties were acquired, the financial interests making such acquisitions were compelled to hold out special inducements to secure railway facilities to market the product, or else construct their own railroads. So also, the struggle for traffic led the early railways to acquire mining properties and to prosecute the two interests jointly.

The rapid industrial development of the country and the concentration of population and manufactures in great cities, necessitated a vast increase in the consumption of coal for heat and power purposes. The production, transportation, and sale of coal, each became immensely profitable as separate industries. The combination of these transactions under a single financial

9 Lehigh Valley R. R. vs. Coxe, 3 I. C. R. 460 (1891); D., L. & W. vs. Haddock, 3 I. C. R. 302 (1890).

10 N. Y., N. H. & H. vs. I. C. C., 200 U. S. 361 (1906).

administration produced greater profits on account of the economic savings effected and the tendency of such combinations to give a monopoly control of prices by controlling all the processes.

The early policy of the local and federal governments fostered joint holdings and operations. In 1875, the railroads of the Pacific Coast possessed 168.57 square miles of territory for each mile of track,[11] this land being granted in large part by the federal government as an inducement to railway construction. At this time the Middle States owned 5.7 square miles, and the Southern States, 49.67 square miles, of land for each mile of track.[12] By 1871, Congress had granted 187,785,850 acres of land for railway purposes, over 150,000,000 of this going to the Pacific roads.[13] Much of this land contained valuable stands of timber and extensive mineral deposits.

States and counties, in their zeal to secure railway facilities, gave similar inducements. The early charters of Pennsylvania and New York stipulated that railways might purchase, own, and operate coal mines, and market the product thereof. Coal companies were likewise empowered to enter the transportation business.

The custom of the joint operation of such industries became so early engrafted into our industrial system that little popular criticism was aroused. Where the interests worked harmoniously, there was development and prosperity; but neither appeared to thrive under independent control, especially when either had to compete with similar industries having complementary railway, or coal-mining, affiliations. These conditions, doubtless, were responsible for the long and bitter wrangles in our state and federal legislatures and courts as to the nature of the common carrier and its responsibilities to the public. Only in very recent years has the public service of the railway and the coal-mining corporation been clearly recognized by the interests involved, or even by our legislatures and courts. In the meantime a situation has developed which would have been impossible had the European system of a strict supervision of all public service corporations been applied to our transportation facilities.

11 First Annual Report of the Internal Commerce of the U. S. for the Fiscal Year Ending June 30, 1876, Appendix 33, p. 243.

12 Do. p. 243.

13 Do. pp. 239, 240.

The facts bearing upon the relations maintained by railways to adjacent coal-mining operations were not fully disclosed until after the passage of the Commodities' Clause, although investigations were set on foot by special Act of Congress prior to the enactment of the statute.[14] Data first presented by the Interstate Commerce Commission, in response to a House resolution as to agreements among the coal roads, did not go beyond those facts already brought out in the annual reports of the roads, and in testimony from time to time before the Commission.[15] In view of the failure of this resolution to produce the desired information another resolution of very broad scope was passed by both Houses of Congress.[16] It authorized the Interstate Commerce Commission to make an exhaustive investigation of the relations of interstate railways to coal and oil properties on their lines. This work was at once taken up by the Commission and reports were made to Congress from time to time as the investigation proceeded.[17]

III. The Anthracite Fields.

The situation in the anthracite fields presents by far the most complex and baffling problems. The difficulty lies in the fact that the entire deposits (and this constitutes practically all the anthracite deposits in the United States) lie within a comparatively small area, the coal region covering only 1,700 square miles and the actual deposits, only 484 square miles. The anthracite region lies in Eastern Pennsylvania and embraces the following counties: Suquehanna, Luzerne, Lackawanna, Dauphin, Northumberland, Carbon, Schuylkill and Columbia. For convenience the coal fields are divided into three regions, the Wyoming, embracing about 176 square miles of the northern section; the Lehigh, embracing about 45 square miles; and the Schuylkill, embracing 263 square miles in the south.[18]

14 H. Res. 4, 59th Cong., 1st Sess.; Joint Res. 32, 59th Cong., 1st Sess.

15 H. Doc's. 475, 59th Cong., 1st Sess., Feb., 1906.

16 Joint Res. 32, 59th Cong., 1st Sess.

17 Appearance of First Report, Jan., 1907, 59th Cong., 2d Sess., H. Doc. 561. Exhaustive hearings were taken throughout the country, the result appearing in seventeen volumes of typewritten matter, infra p.

18 (a) The Anthracite Coal Industry, Peter Roberts, pp. 5 and 6. (b) Bulletin Department of Labor 46, p. 444. (c) The Penn. Anthracite Coal Field, U. S. Geological Survey, p. 61.

This small area contains the most valuable anthracite deposits in the world. The value of the annual output is surpassed in value by only two other mineral products, iron ore and bituminous coal.[19]

Prior to 1830-1840, the product was carried to the Eastern markets by wagons, canals, and in one case partly by a gravity road.[20] As the demand and the production increased, and the power of steam came to be applied to transportation, capital was attracted by the great possibilities of this region. The first railroad was constructed in the coal fields in 1832 by the Lehigh Navigation Company. By 1846, 436 miles had been completed representing a capitalization of $18,000,000. Twenty-six years later the combined lines of "anthracite" roads had attained an extent of over 2,000 miles, the interests being capitalized at $128,000,000, the number of separate railway corporations being reduced from twenty, in 1846, to six in 1872, and practically to four in 1902.[21]

Carriers early began acquiring mining properties by purchase outright, by purchase of controlling stock in independent coal companies, or by establishing such companies as subsidiary to their railway interests. Many such properties were owned in the name of the railroad prior to 1874, when a provision was incorporated into the state constitution of Pennsylvania prohibiting such direct control and operation,[22] the clause being construed, however, to apply to future acquisitions. Since there was no provision prohibiting control through stock ownership or subsidiary companies, the situation was not materially changed in subsequent years.

1. **The Delaware, Lackawanna and Western Railroad.**—The Delaware, Lackawanna and Western was among the earliest roads to enter the anthracite fields, being chartered under the laws of Pennsylvania in 1849. The first important consolidation was effected by it in 1881, whereby it secured control of about 900 miles of track, thus bringing under its influence about 15,000 acres of coal properties lying in the Wyoming and Lackawanna

19 The Production of Coal in the United States, Geological Survey, 1907, p. 175; also Mineral Products of the U. S., 1898-1908, United States Geological Survey, 1907.

20 The Anthracite Coal Industry, Peter Roberts, pp. 61-62.

21 Do. pp. 65-66.

22 Article 17, State Constitution, Sec. 5, effective January 1, 1874.

Valleys.[23] All the lines actually owned by it are in the State of Pennsylvania; although it operates leased lines extending into the states of New Jersey and New York. About half of its coal properties were acquired directly or through lease prior to the adoption of the state constitutional provision prohibiting such acquisitions.[24] These coal properties constitute about 5.6 per cent of the total deposits of anthracite.[25] Practically all the tonnage of this road, amounting in 1907 to 13.56 per cent (9,249,692 tons) of the total output of the Pennsylvania fields, enters into inter-state commerce.[26] Of this amount, 1,159,655 tons were purchased from producers not affiliated with the railway. The larger part of this was received subject to the 65 per cent contracts.[27]

2. The Lehigh Valley Railroad.—The Lehigh Valley, incorporated under the laws of Pennsylvania in 1847, effected consolidations with coal companies about the same time as the Delaware, Lackawanna and Western. Its properties were frequently extended until, in 1907, it controlled through subsidiary corporations over 37,000 acres of coal lands.[28] Nearly three-fourths of this property was acquired subsequent to the enactment of the prohibitive statute of 1874, the larger part being secured from the Lehigh Valley Coal Company. The capitalization of the Lehigh Valley coal properties is now something over $8,000,000. This includes the valuable properties of Coxe Brothers and Company, Inc., capitalized at $2,910,150; the New York and Middle Coal Field Railroad and Coal Company, capitalized at $1,500,000; and the Wyoming Valley Coal Company, capitalized at $1,300,000.[29] Through these subsidiaries, the Lehigh Valley Railroad was estimated, in 1907, to control about 13.8 per cent of the

23 Anthracite Coal Industry, Peter Roberts, p. 6.

24 U. S. vs. Reading Co. et al., S. C. of U. S., Oct. Term 1910, Gov't Exhibit No. 70, Rec. Vol. 3.

25 Do. calculation based on table showing distribution of anthracite coal lands among principal holders, Vol. 3, p. 328.

26 Table showing total output of anthracite coal in 1907 and the proportion marketed by the principal operators, Brief for U. S. in U. S. vs. Reading Co. et al., Oct. Term, 1912, p. 29.

27 Same as (24), Gov't Exhibit, Nos. 72, p. 170, and 75, p. 166.

28 Do. No. 57, pp. 134, 136.

29 U. S. vs. Reading Co. et al., S. C. of U. S., Oct. Term, 1910, Gov't Exhibit No. 57, Rec. Vol. 3, p. 134.

anthracite deposits[30] and to produce annually something over 8,000,000 tons, or 10.51 per cent of the total annual production of anthracite coal.[31] In addition to this amount from her own mines, the Lehigh Valley contracted annually for about 4,000,000 tons from independents on the basis of the 65 per cent. contracts.[32]

3. **The Erie Railroad Company.**—The Erie Railroad, incorporated in 1832 under the laws of New York, controls about 2,100 miles of track.[33] It does not own any coal property in its own name but controls through stock ownership about 27,000 acres of valuable coal fields in the Wyoming region. These holdings include the entire capital stock of the Hillside Coal and Iron Company, capitalized at $1,000,000, and possessing 13,466 acres of coal lands;[34] and that of the Pennsylvania Coal Company, capitalized at $5,000,000, and possessing 13,900 acres.[35] These acquisitions bring under the control of the Erie Railroad about two and one-half per cent of the entire area of anthracite deposits.[36] This area, however, produces about 5,800,000 long tons of coal annually, or about 7.6 per cent of the total production of anthracite.[37] The influence of the Erie has been extended through the purchase, in 1907, by the Hillside Coal and Iron Company and the Pennsylvania Coal Company, of over 3,000,000 long tons from other operators, the larger part having been purchased under standing 65 per cent contracts.[38] Although that portion purchased by the Pennsylvania Coal Company was shown to have been received on the same price basis, evidence was submitted to show that the contracts were not permanent.[39]

4. **The Central Railroad Company, of New Jersey.**—The Central entered the Pennsylvania coal fields in 1869. Two years later, it secured a perpetual lease upon the Lehigh and Susque-

30 U. S. vs. Reading Co., et al., S. C. of U. S., Oct. Term, 1910, Gov't Exhibit No. 169, Rec. Vol. 3, p. 416.
31 Do. Gov't Exhibit No. 55, Vol. 3, p. 132.
32 Do. Calculation based on table, Gov't Exhibit No. 63, Vol. 3, p. 140.
33 Annual Report of the Erie R. R. for 1910.
34 Same as (30), Gov't Exhibit No. 82, Rec. Vol. 3, p. 171.
35 Do. Gov't Exhibit No. 84, Rec. Vol. 3, p. 172.
36 Do. Calculation based on table, Gov't Exhibit No. 157, Vol. 3, p. 328.
37 Do. Gov't Exhibit No. 169, Vol. 3, p. 416.
38 Do. Gov't Exhibit No. 88, Vol. 3, p. 176.
39 Do. Gov't Exhibit No. 91, p. 180.

hanna Railroad, a corporation controlled by the Lehigh Valley Coal and Navigation Company and chartered by the laws of Pennsylvania.[40] The 160 miles of track thus acquired furnishes all the coal tonnage received by the Central Railroad, from which accrues about half the freight receipts of the latter.[41] The Lehigh Coal and Navigation Company controls 13,783 acres of coal property,[42] and produces over 1,000,000 tons annually.[43] The agreement entered into with the Central calls for at least three-fourths of this tonnage.[44] The Central also owns more than nine-tenths of the entire capital stock of the Lehigh and Wilkes-Barre Coal Company, a corporation capitalized at $10,000,000, operating on the lines of the Susquehanna Railroad.[45] This company controls 15,650 acres of coal property[46] and produces over 2,000,000 tons of coal annually.[47] The Central controls the entire output of these mines, which, together with the product controlled by lease and contract, constitutes about 10 per cent of the entire anthracite deposits.[48] The annual production bears about the same ratio to the total.[49] The Lehigh and Wilkes-Barre Coal Company, purchases annually, a large amount of coal from other operators. In 1907, 971,502 tons were so purchased, 938,594, tons of which were received subject to standing 65 per cent agreements.[50]

5. **The Delaware and Hudson Company.**—The Delaware and Hudson owns directly and through subsidiary companies about 35,000 acres of coal lands in the northern and southern sections of the anthracite fields.[51] These holdings constitute about 2.29 per cent of the entire deposits.[52] This was one of the early roads to enter into the business of producing coal. It acquired, in 1869,

40 U. S. vs. Reading Co., et al., S. C. of U. S., Oct. Term, 1910, Rec. Vol. 2, p. 628.
41 Do. Vol. 3, p. 117.
42 Do. Gov't Exhibit No. 1, Vol. 3.
43 Do. Vol. 3, p. 30.
44 Do. Gov't Exhibit, No. 2, (lease agreement), Vol. 3, pp. 2-8, 10, 11.
45 Do. Gov't Exhibit, No. 169, Vol. 3, p. 416; also No. 43, p. 118.
46 Do. Vol. 3, Gov't Exhibit No. 44, p. 119.
47 Do. Gov't Exhibit No. 51, Vol. 3, p. 128.
48 Do. Gov't Exhibit No. 157, Vol. 3, p. 329 (calculation).
49 Do. Vol. 3, p. 416 (calculation).
50 Do. Gov't Exhibit No. 48, Rec., Vol. 3, p. 122.
51 Do. Gov't Exhibit No. 124, Vol. 3, p. 210.
52 Do. Vol. 3, p. 537 (quoted from the Bond Record, June, 1896).

the entire capital stock of the Northern Coal and Iron Company, a corporation capitalized at $1,500,000; and later, several minor concerns, having a total capitalization of something over $200,000.[53] In 1907, this road hauled about 10,000,000 tons of anthracite coal, practically all of which was owned directly or through control of the stock of constituent companies.[54]

6. The Philadelphia and Reading Railway Company.—The Philadelphia and Reading seems to have been the most successful of the anthracite group in securing control of valuable coal properties, in working out plans for the successful operation of such properties in connection with its own railway, and in bringing about uniformity of action among the roads of this group. The Reading was one of the earliest roads to enter the coal fields. By 1873 it was capitalized at $80,000,000, possessed about 500 miles of trackage, and carried six and a half million tons of coal annually, from which it realized nearly $10,000,000 gross revenue. In little more than twenty years, its capitalization had reached $144,000,000, its tracks, 1,159 miles, with proportional increase in its tonnage and annual revenues; and by 1907 it was carrying over 13,000,000 tons of its own coal from which it received the gross revenue of $13,088,020.[55] During this period it extended the value of its coal holdings from $54,000,000 to $100,000,000; and this, in spite of the fact that it had mined about 200,000,000 tons.[56] At present the Reading Coal properties cover 92,569 acres,[57] about one-half of which was acquired subsequent to the prohibitory legislation of 1874.[58]

The position of the Reading interests was further strengthened by the re-organization in 1896, when the Reading Company, a holding company, acquired all the stock of the Philadelphia Coal and Iron Company and the Philadelphia and Reading Railroad.

The Interstate Commerce Commission, in its recent report, summarized the result of the unique combination of mining, transportation, and speculative interests, as follows:

"The situation here presented is that this shipper, the

53 U. S. vs. Reading Co., et al., S. C. of U. S., Oct. Term, 1910, Rec., Vol. 3, pp. 208, 209.

54 Do. Vol. 3, p. 207.

55 Do. Vol. 3, p. 91.

56 Do. Vol. 3, p. 328.

57 Do. Gov't Exhibit No. 231, Vol. 3, p. 328.

58 Do. p. 103.

coal and iron company, ships approximately 10,000,000 tons of anthracite coal annually over the Reading lines. Presumably it pays the tariff rates on this product. The carrier and the coal company are but the subsidiary corporate hands of the holding company, in as much as the same interests direct and administer the affairs of the three corporations. By the aid of the railway earnings that are paid into its treasury, the holding company furnishes the coal and iron company with its working capital. The holding company also assumes the burden of the interest charges on the capital invested in the properties of the coal and iron company, and the railway earnings enable it to do so. These facts constitute an unlawful discrimination against other shippers who are the competitors of the Coal and Iron Company. .....

"Published tariff rates are of no significance to this shipper, the Philadelphia and Reading Coal and Iron Company, under such circumstances. The same executive officials control and administer the affairs of the railway company, the coal and iron company, and the holding company; therefore the coal and iron company receives offsets, against such published rates in the form of interest charges which are waived by the same parties who are charged with the duty of collecting and retaining the full published tariff rates on all shipments."[59]

The Reading first attempted to secure control of the tonnage of independents by the so-called "percentage agreements." It appeared that a large number of such contracts were made in 1891 and 1892 when the Reading launched her ambitious plans for increasing her influence over the coal industry.[60] Independents were practically forced into such agreements since they amounted to a virtual reduction of actual freight rates from the published tariffs,[61] in effect a rebate to the shipper. The majority of such agreements were entered into for seven years and seem to have been on the sixty per cent basis, that is, turning over to the operator sixty per cent of the market price at tide-water.

59 Report of I. C. C. No. 4914, July 30, 1915, pp. 240, 241.

60 U. S. vs. Reading Co., et al., S. C. of U. S., Oct Term, 1910, Rec., Vol. 2, pp. 481, 482.

61 The government annexed to its Brief as an exhibit elaborate tables drawn from authoritative sources showing that the amount accruing to the carrier on the percentage plan had not been sufficient to cover published rates—the deficit being indicated over a period of years (1892-1899). Appendix to Brief in cases before S. C., Oct. Term, 1912, Nos. 477, 485, 504, also do. Vol. 2, p. 472.

About the time these contracts were maturing (1899), there was a very stubborn strike among employees and a ten per cent increase in wages had to be agreed to before they would resume work. Independent operators endeavored to shift a portion of this added expense upon the roads and demanded that they receive on future contracts sixty-five per cent, instead of sixty per cent, of the market price of coal. This the railway refused. The independents then set about the construction of a new line to be known as the New York, Wyoming, and Western Railroad, which was to be capitalized at $1,000,000. This led the carriers, under the leadership of the Reading, to effect a scheme by which practically all of the output of independent mines was bound over in perpetuity to the roads participating.[62]

7. **Inter-Railway Relations in the Anthracite Fields.**—We are now to consider the agreements among the carriers themselves by which they have been able to force independent operators into contracts involving their entire output. In 1892, as a part of the program outlined in the preceding paragraph, the Reading secured a lease on the Lehigh Valley and the New Jersey Central railroads for 999 years.[63] It appears from a table compiled by the well-known mining engineer, Griffith, that this arrangement gave the Reading full control of over seventy-five per cent of all the anthracite coal deposits.[64] The Reading's own estimates place it at sixty-three per cent.[65] The lease and holdings thereunder were, however, destined to be short-lived. In less than two years, the New Jersey courts had invalidated the lease of the New Jersey Central,[66] a New Jersey corporation; and when the Chancellor of New Jersey held that the lease of the Lehigh Valley was illegal, it was forthwith dissolved through

62 U. S. vs. Reading Co., et al., S. C. of U. S., Oct. Term, 1910, Rec., Vol. 2, pp. 474-480.

63 Through such an arrangement the Reading was able to contract for the product of the Lehigh Valley Coal Co., and the Lehigh and Wilkes-Barre Coal Co., hitherto controlled by the railroads, respectively (U. S. vs. Reading Co., et al., S. C. of U. S., Oct. Term, 1910, Rec. Vol. 2, pp. 192, 196, 197). The lease of the Central Railroad of New Jersey was effected through the Port Reading Railroad, the entire capital stock of the latter being owned by the P. & R. (Do. pp. 192, 196).

64 Do. Vol. 2, p. 537.

65 Annual report P. & R., 1901.

66 Stockton vs. Central Railroad (50 N. J. Eq., 52, 84, 491).

statutory procedure in Pennsylvania.[67] It was estimated by the Department of Labor that this compact had raised the price of anthracite coal about seven per cent.[68]

From the time of the invalidation of these leases until 1896 there was a degree of competition among the anthracite roads. In that year the presidents of the six leading companies came to an understanding as to the proportional tonnage which each road should have. Twenty and five-tenth per cent was allotted to the Reading; 15.65, to the Lehigh Valley; 11.7 to the Central of New Jersey; 13.35, to the Delaware, Lackawanna and Western; 9.6 to the Delaware and Hudson; 11.4, to the Pennsylvania; 11.2, to the Erie; and small amounts to others.[69] This agreement was not generally carried out to the letter, but it was an important factor in the distribution of tonnage for several years thereafter. It impressed the railroads, too, with the advantages and the possibilities of coöperation; and they were about to have an opportunity to demonstrate the efficacy of such agreements.

Reference has already been made to the conditions causing the independents to request a larger part of the proceeds from sales than the seven year contracts, now maturing, had provided.[70] On the carriers' refusal, the plan of the independents was launched. Messrs. Simpson and Watkins, owners of large private interests, with the coöperation of the Pennsylvania Coal Company, made agreements with a large number of independent operators to take their entire shipments on a sixty-five per cent basis, which the latter had demanded as the condition upon which expiring contracts would be renewed. The New York, Wyoming and Western, the projected road, was to connect coal fields of the Northern section with the Delaware River where juncture was to be made with lines leading to eastern distributive points.[71]

The project was fairly under way, but a plan was evolved by the roads, through the agency of J. P. Morgan and Company, for frustrating it. This plan, in short, involved the elevation of an

67 U. S. vs. Reading Co., et al., S. C. of U. S., Oct. Term, 1910, Rec., Vol. 2, p. 196.

68 Bulletin 39, March, 1902, pp. 348-386.

69 Do. pp. 26-28, 58, 59, 88, 101; also Rec. Vol. 3, p. 34. This table is misleading unless studied in connection with testimony in Vol. 2, pp. 88, 89.

70 Supra, pp. 41, 42.

71 Same as 67, Articles of Association of the New York, Wyoming and Western R. R. Co., Vol. 6, p. 46.

hitherto minor corporation, The Temple Iron Company,[72] engaged in the manufacture of iron, to a corporation having sufficient capital stock to be distributed among all the independents involved in the transaction, in exchange for the stock of the latter. The controlling interest in the Temple Iron Company was then bought over by a trust company, the stock then being distributed among the railways in the following ratio: The Philadelphia and Reading, 29.96; Central of New Jersey, 17.12; Lehigh Valley, 22.88; Delaware, Lackawanna and Western, 19.52; Erie, 5.84; and the New York, Susquehanna and Western, 4.68.[73] The output of the mines involved is about 2,000,000 tons annually, all of which enters into inter-state commerce.[74]

The Temple Iron Company entered into perpetual contracts with practically all the independents, except the Pennsylvania Coal Company,[75] for the output of their mines. These agreements bound the operators to turn over the entire output (until extinct) of the mines they were then operating as well as any new ones they might open up in the future, in consideration of which the railroads through their medium, The Temple Iron Company, allowed sixty-five per cent of the market price of coal at New York harbor.[76] By this means the carriers prevented the construction of a new line into the coal fields; and not only this, but they tied up the future output of practically all the independents in such a way that rival lines could secure no tonnage

72 The Temple Iron Company, a corporation controlled by the Reading and capitalized at $240,000, was recapitalized at $2,500,000 and bonded at $3,500,000. Simpson and Watkins, acting for the independents, turned over to this corporation all the capital stock of the latter, for which they received $2,260,000 stock and $3,500,000 bonds of the Iron Co. All the stock and $2,100,000 of the bonds were turned over to a trust company in exchange for $3,238,296.66 in cash and a stock interest valued at $1,000,000. The Trust Co., also secured at something under par the $240,000 stock from President Baer, of the Reading. This represented the original capitalization of the Iron Company. (Contract shown in Gov't Exhibit No. 165, Rec. Vol. 3, p. 403, 404.)

73 U. S. vs. Reading Co., et al., S. C. of U. S., Oct. Term, 1910, Gov't Exhibit No. 163, Rec. Vol. 3, p. 393-398; and No. 164, 398-403, Rec. Vol. 2.

74 Do. Vol. 2, p. 335.

75 Do. Gov't Exhibit 107, 108, Vol. 3, p. 194. This company refused to enter into the agreement above described.

76 Do. Vol. 2, pp. 488, 490. The percentage here given applies only to specially prepared coal; operators receive lower percentages on lower grade varieties.

as an inducement to enter the anthracite fields. It gave the railroads a monopoly so long as the contracts could be enforced.

In a similar way, the Erie Railroad alone bought over the entire capital stock of the Pennsylvania Coal Company to prevent the latter from extending a private line to tide-water connections.[77]

This left the anthracite roads in complete possession of the field. Through the leadership of the Reading, moreover, the "community of interests" has been extended into other fields. This railway has not only acquired large holdings in the New Jersey Central and Lehigh Valley, but has formed alliances with the Harriman and Vanderbilt interests through stock ownership in the Lake Shore and Michigan Southern and the Baltimore and Ohio.[78] It seems now to have taken its place as a forceful unit in the great railroad systems of the country. Through the sixty-five per cent contracts,[79] the ownership of mining stock, directly or through subsidiary companies, and the "community-of-interest" principle, the railways in the anthracite region may thus be seen to have evolved a unique monopolistic condition without parallel.

IV. The Eastern Bituminous Fields.

The situation in the great bituminous fields of Pennsylvania, Virginia, West Virginia, and Ohio, is similar in many respects to that in the anthracite territory. The great and somewhat irregular extent of the fields, and the heavy tonnage in other commodities, however, renders such complete railway control of the bituminous coal mines impossible. It was in fact this very partial control by the railroads that led to so much complaint on the part of independent operators, of whom there were many, in the bituminous region. Protests from this source,[80] rather than from the comparatively few independent operators of the almost hopelessly monopolized anthracite mines, first led to Congressional investigation.

77 J. P. Morgan & Co. also acted as agent for this transaction, buying the entire capital stock of the Penn. Coal Co., the railroad already owned by the latter, as well as the projected road, for $28,000,000. All the stock of the three concerns was turned over to the Erie Railroad. Do. Rec. Vol. 2, pp. 488-490.

78 Moody's Magazine, January, 1908, p. 103.

79 See Decision of the Supreme Court, re 65 per cent contracts, infra pp. 114, 115.

80 Cong. Rec., 59th Cong., 1st Sess., pp. 1671-1672, 2198.

The investigation made by the Commission showed that practically all the bituminous coal traffic originated on the lines of the following railways; The Norfolk and Western; The Western Maryland; The Chesapeake and Ohio; the Baltimore and Ohio; the New York Central and Hudson River; the Buffalo and Susquehanna; the Buffalo, Rochester, and Pittsburgh; The Pittsburgh, Shawmut and Northern; and the Pennsylvania.[81] The Pennsylvania Railroad Company appears to be the directing force in a combination designed to control the situation in the bituminous fields.

1. **The Norfolk and Western Railway.**—The Norfolk and Western Railway at the time of this investigation appeared to have no other mining interests than resulted from its stock ownership.[82] It owned, however, the entire capital stock of the Pocahontas Coal and Coke Company, which possessed mineral rights in 300,000 acres of coal lands in Virginia and West Virginia.[83] This was a land-holding company which leased large parts of its holdings to individual operators.[84] The coal produced from these holdings amounted to about 35 per cent of the entire coal tonnage of the Norfolk and Western Railway.

Practically no criticism of the company's plan of distributing cars was brought out before the Commission, but there was general and wide-spread complaint of the scarcity of cars. This was frankly recognized by the railway officials.[85] Mines received a certain allotment of cars according to their producing capacity, this being measured by the average output for a given period when the mines in question had a "fair working run of equipment."[86] The several mines within each region, with the exception of the Pocahontas region, where the number of coke ovens operated was the criterion, received cars on the percentage basis, the capacity of each mine to the total capacity of the mine in a given district determining the number assigned.[87] The

81 H. Doc. 516, pp. 2-3, 59th Cong., 2d Sess. (Digest of Testimony submitted to Congress by the Commission).

82 Testimony before the Commission re coal and oil under authority of Joint Res. 32 (59th Cong., 1st Sess.; appears only in typewritten form —17 Vols.), Vol. 5, pp. 2397, 2444.

83 Do. Vol. 5, pp. 2442, 2443.

84 Do. p. 2443.

85 Do. p. 2468.

86 Do. p. 2465.

87 Do. pp. 2451, 2453, 2465.

United States Coal and Coke Company was not included in this allotment scheme because most of its output was consumed by it. Cars were simply supplied this company as they were needed.[88] Cars assigned for fuel purposes were not included in the regular number alloted.[89] In addition there were "arbitrary" cars distributed by special agreement between the operators and the railway company. These constituted about six per cent of the total number available[90] and appear to have been granted as an aid to mines in their early development.[91] From the testimony of officials, and this was not controverted, the policy of the railroad was to oppose stock ownership or other interests by officials and employees along the lines of the railroad.[92] It appeared, also, that due encouragement was given to prospective shippers with respect to connections, switches and other conveniences.[93]

2. **The Western Maryland Railway.**—The Western Maryland owned all the stock of the Davis Coal and Coke Company, one of the largest coal-mining concerns in the State of West Virginia; and all the stock of the Maryland Smokeless Coal Company.[94] The entire tonnage of these mines was handled by it.

In addition to 100,000 acres of coal lands in its own right, the Davis Coal and Coke Company owned sixteen concerns along the lines of the Western Maryland.[95] There are forty independent mines in the same section.[96] It appeared from evidence that the independent mines received 36 1-10 per cent of the total number of cars distributed, the remaining 63 9-10 per cent going to the mines operated by the Davis Coal and Coke Company.[97] The evidence does not state the relative capacity of the independent mines and those under the control of the Western Maryland

88 Testimony before the Commission re coal and oil under authority of Joint Res. 32 (59th Cong., 1st Sess., appears only in typewritten form—17 Vols.), Vol. 5, pp. 2458, 2459.
89 Do. pp. 2472, 2473.
90 Do. p. 2455.
91 Do. pp. 2454-2458.
92 Do. pp. 2432, 2433.
93 Do. p. 2464, 2465.
94 Do. pp. 6252, 6253.
95 Do. Vol. 12, p. 6252.
96 Do. p. 6253.
97 Do. p. 6252.

through the Davis Coal and Coke Company. It is impossible to state accurately, therefore, whether 36 1-10 per cent constitutes a fair allotment of available cars. The representatives claimed that car distribution was based on tonnage. It appeared, however, from testimony of the independents that the operator's (that is, of affiliated mines) own estimate was accepted without question and that no railway official ever made a personal investigation to determine the proper percentage to be allowed. The evidence demonstrated conclusively that no real system of car distribution existed, and that the loose practice in this regard gave many opportunities for discrimination against the independent operator.[98] The road purchased all its own fuel from the Davis Coal and Coke Company, but claimed that all cars, with an insignificant exception,[99] were accredited to the mines and were not considered as an extra allowance.[100] No direct testimony was submitted to show that operators or prospective operators were unable to get the facilities which their business required, and the testimony of the general manager that it was the policy of the Western Maryland "to encourage and develop independent mines,"[1] was not controverted.

3. The Chesapeake and Ohio Railroad.—The Chesapeake and Ohio owned about 28,000 acres of coal land in its own right. These lands were secured from the Western and Pocahontas Coal and Lumber Company at a foreclosure sale.[2] The Chesapeake and Ohio had failed to keep its agreement to construct a branch line for the benefit of this concern, the latter being forced to sell out because transportation facilities were not available.[3] At the time of this investigation such facilities had not yet been constructed.

The Chesapeake and Ohio was not shown to control any subsidiary companies through stock-ownership; nor was there any evidence that the officers or employees had any such interests.[4]

98 Testimony before the Commission re coal and oil under authority of Joint Res. 32 (59th Cong., 1st Sess., appears only in typewritten form), —Vol. 12, pp. 6242-6244, 6273.

99 Do. p. 6273, The Buffalo Creek Coal Co.

100 Do. p. 6255.

1 Do. p. 6253.

2 Do. Vol. 8, p. 4364.

3 Do. pp. 4364, 4365.

4 Note insignificant exception, Do. Vol. 8, pp. 4363, 4364.

The principle of assigning cars according to the capacity and equipment of mines appeared to be carefully enforced.[5] A single exception was noted in the case of the Stevens Coal Company which received twenty-two cars for a specific purpose.[6] There were no individual or privately owned cars,[7] but it was shown that arbitrary allotments had been made to the Kanawha Fuel Company and the Carbon Fuel Company for the railroad's fuel supply.[8]

4. The Baltimore and Ohio Railroad.—The Baltimore and Ohio was found to be concerned with coal interests in Southern Pennsylvania, Western Maryland, and Northern West Virginia. With the single exception of the Connellsville mines, the coal carried from mines in which this road was interested, was far in excess of that carried in which it had no interest. This control of coal tonnage was made possible through its control of the majority of the capital stock of the Consolidation Coal Company, a corporation capitalized at $10,250,000 and producing about 2,000,000 tons of coal annually.[9]

In 1903, the Baltimore and Ohio further extended its holdings by the acquisition of the Fairmount Coal Company, and several smaller concerns.[10] The former was capitalized at $12,000,000,[11] owned 33,000 acres of coal lands and controlled by lease about 25,000 additional acres.[12] From these combined interests the Baltimore and Ohio secured the larger part of its tonnage.

At the time of the investigation (1906) the Baltimore and Ohio sold her interest in the Consolidation Company to a syndicate representing this railroad and other interests.[13] The transaction was claimed to have been made in good faith although the details as to payment and transportation of coal from mines controlled by the Consolidation, raise some doubt as to whether

5 Testimony before the Commission re coal and oil under authority of Joint Res. 32 (59th Cong., 1st Sess., appears only in typewritten form—17 Vols.), Vol. 5, pp. 2548, 2459.

6 Do. Vol. 5, p. 2244.

7 Do. p. 2244.

8 Do. p. 2252.

9 Do. pp. 2177-2179.

10 Do. pp. 2176, 2177.

11 Do. p. 2172.

12 Cramp, Mitchell, and Serrill's Manual of Statistics, pp. 444-455.

13 Same as (5), Vol. 5, p. 2175; Vol. 6, pp. 2781-2782.

the result, aimed at in the law, was thereby attained. The sale was arranged for in deferred notes extending over a period of thirty years, the stock representing the interest sold, being placed in the hands of a trustee as security until the entire payment shall have been made.[14] The second vice-president testified that notwithstanding the long period for which the loan was to run, that the stock had passed entirely out of the control of the Baltimore and Ohio.[15] The relinquishment of the right to control the vote, however, would not seem seriously to affect the railroad's control of the situation, at least for thirty years, since it was written into the agreement that the railroad should have a monopoly of all the shipments of the Consolidation and its subordinates until all the notes were fully paid.[16] We would, therefore, expect little difference in the policy of the railroad toward these interests and those of the independent operators, especially since the railroad will feel bound to maintain the value of the securities accepted in lieu of payment for the stock sold.

The Baltimore and Ohio also entered the business of marketing its product. This was effected through the agency of the Metropolitan Coal Company, operating as a retailer of coal in Boston; and the Northwestern Fuel Company, operating in the territory of the Great Lakes. Through these and other similar agencies, the Baltimore and Ohio controlled not only the production and transportation of most of the coal in this region, but the retailing of it as well. This was practically acknowledged by authoritative testimony before the Commission. The superintendent of transportation for the Baltimore and Ohio was asked if his railroad did not carry on these additional activities. He answered, "I would not challenge that statement."[17]

It was further disclosed in the hearing that ten officials owned an aggregate of 717,800 shares of stock in certain coal companies on the lines of the Baltimore and Ohio. In some cases these stocks were secured by straight-out purchase, in others as a bonus for the purchase of bonds, and in a few instances as gifts

14 Testimony before the Commission re coal and oil under authority of Joint Res. 32 (59th Cong., 1st Sess., appears only in typewritten form—17 Vols.), Vol. 5, 2178.

15 Do. Vol. 5, 2178.

16 Do. Vol. 5, p. 2183.

17 Do. Vol. 1, p. 369.

with the probable expectation of receiving consideration in the distribution of cars and handling of traffic.[18]

The method of car distribution employed resulted in favoritism for mines in which the carrier was interested, although railroad officials claimed that the distribution was based on the capacity of mines and the amount of shipments.[19] The estimates were supposed to be made annually by a mine inspector[20] but it appeared that they were secretly made, one operator not being permitted to see the quota assigned another. There were, moreover, any number of individual, and arbitrarily assigned, cars. Individual, or privately owned cars, were first placed at the mines of the owners of such cars,[21] then special assignments were made for "Baltimore and Ohio fuel, foreign fuel and foreign cars".[22] The greatest confusion leading to severe discrimination against the small operator resulted from this system.[23] Only the large operators, generally shown to be those having railway affiliations, could afford to construct and maintain such an elaborate system of private cars; and of course, all special cars for Baltimore and Ohio fuel coal were assigned to mines controlled by the railway. It appeared in most cases that the Consolidation and affiliated mines controlled these extra supplies.[24]

The individual car was not included in the regular assignment of cars to give operators. The extra tonnage, however, which a given mine would produce on account of such increased facilities, was considered in estimating the output of such mine in making further apportionment. This was doubly discriminative against the small, independent operator. Sufficient facilities were not supplied him; whereas the owner of private cars might keep his mines running at their capacity, all the while increasing his

18 H. Doc. 561, p. 28, 59th Cong., 2d Session.

19 Testimony before the Commission re coal and oil under authority of Joint Res. 32 (59th Cong., 1st Sess., appears only in typewritten form—17 Vols.), Vol. 1, pp. 427, 428.

20 Do. Vol. 2, p. 552.

21 Do. Vol. 1, p. 387.

22 Do. p. 388.

23 Do. The policy is well illustrated by the following conversation between the General Superintendent of Transportation and the Commission: Quest. "Do you haul individual cars for anybody who wants to get them?" Ans. "I do not think I can answer that question.....Just what the policy of the road is, I do not know." Vol. 1, pp. 372, 373.

24 Do. Vol. 2, p. 625.

supply of cars by increasing his output. The custom of crediting the amount shipped, two points, and physical capacity, only one point, was, in the nature of the case, a discrimination against such small operators as were unable to increase their shipments by the use of private cars.

A striking case of discrimination was shown in the case of the Fairmont Coal Company, a subsidiary of the Consolidation Coal Company. A large part of Fairmont Coal lands lies along the Monongahela River Railroad Company. The Baltimore and Ohio took over this railroad and with it 2,500 private cars. It was specifically agreed that all these cars should be assigned the Fairmont Coal Company, and, furthermore, that they were to be considered "individual" cars, and not charged against the Fairmont in making allotments.[25] This and other similar practices wrought serious hardships upon independents. The President of the Monongahela River Coal and Coke Company, an independent operator in this section, declared that, "The shortage of coal cars has seriously curtailed our production and increased our costs. The Company purchased six hundred cars during the past year and but for the use of these cars would not have been able to fill contracts".[26] Numerous similar cases appeared in the testimony, certain operators being compelled to discontinue operations and sell their plants at a sacrifice because adequate shipping facilities were not provided.[27]

The private car system appeared in many cases to have the encouragement of railway officials. The vice-president defended this system on the ground of his inability to furnish the supplies demanded by the rapid development of some of the mines.[28] In accord with this view the Baltimore and Ohio had bought supplies for certain shippers with funds supplied by the latter. It was understood that such cars would be supplied to the mines furnishing credit and that the railroad would later take them over, it being agreed, however, that the shipper in question would

25 Testimony before the Commission re coal and oil under authority of Joint Res. 32 (59th Cong., 1st Sess., appears only in typewritten form—17 Vols.), Vol. 6, pp. 2960, 2961.

26 Annual report of Monongahela River Coal and Coke Co., January, 1906.

27 Same as 25, Vol. 2, pp. 701-707, Vol. 6, pp. 2810-2812.

28 Do. Vol. 5, pp. 2184, 2185.

have exclusive use of the cars for a number of years thereafter. All the while such cars were to be regarded as "extras."[29]

It was the policy of the Baltimore and Ohio to discourage and even prevent independent operators from entering the field in competition with mines in which the railway was interested.[30] It was brought out very clearly in the testimony that the mines connected with the railway received the equipment necessary to their development. They were able to maintain regular annual contracts, to keep an adequate force at work throughout the year, and to place shipments promptly at their destination.[31] Independent operators were not so fortunate. "We were discouraging," testified the Vice-President, "the opening of coal mines all through the district, and if we had not had that provision in the contract" (referring to an agreement with the Cook Company whereby a switch was to be put in with the understanding that coal could not be shipped), "they might have claimed the right to ship coal when at the same time we had declined connections with other coal operators."[32]

The Baltimore and Ohio, together with the Philadelphia and Reading, had devised a plan for securing orders for foreign fuel coal in the interest of their own mines, or mines with which they were affiliated. This was effected by quoting a joint rate with the foreign road equal to, or less than, the local rate, each road receiving its proportion of the joint rate.[33] The rates accruing to the roads participating in this transaction were, herefore, less than the published tariffs. This arrangement amounted to a rebate in favor of the foreign road purchasing the fuel coal.

5. The New York Central and Hudson River Railroad Company.—The New York Central and Hudson River, like the Baltimore and Ohio, did not own directly any coal mines. Individual stock interests (that is, of officials and employees) were found to be insignificant, including only small holdings by certain officials in the Beach Creek Coal and Coke Company and the Clearfield Company. The railway as a corporation held a large

29 Testimony before the Commission re coal and oil under authority of Joint Res. 32 (59th Cong., 1st Sess., appears only in typewritten form—17 Vols.), Vol. 5, pp. 2184, 2185, 2191, 2195, 2200.

30 Do. Vol. 2, p. 701.

31 Do. pp. 625, 626, 631, 632.

32 Do. pp. 625, 626.

33 Do. Vol. 4, pp. 2052, 2060, 2063, 2072.

stock interest in these companies and the officials held a certain amount of stock in their own name. The latter was claimed to be solely for the purpose of qualifying such officials for directorships in the coal company. The railway owned the remainder of the stock in the Clearfield Company but claimed that the entire output was consumed for its own purposes.[34]

In 1910, the Beech Creek Coal and Coke Company, a corporation organized under the laws of Pennsylvania, gave 5,000 shares of its capital stock to the New York Central with the understanding that the latter would furnish annually a sufficient number of cars to transport 1,000,000 tons of coal, the mining company agreeing to furnish at least this amount. The contract further prohibited the railroad from going into the coal business and obligated it to purchase annually at least 500,000 tons of fuel coal from the Beech Creek Coal and Coke Company, an exception being made in the case of the Clearfield Bituminous Coal Company. Since this agreement the New York Central, according to the testimony of the coal company, had invested, by the close of 1906, about one and one-half million dollars in developing the territory of the Beech Creek Coal Company, making tracks, sidings, etc.[35]

In 1906, the Beech Creek Coal Company was taken over by the Pennsylvania Coal and Coke Company, a concern on the Pennsylvania Division of the New York Central and Hudson River Railroad.[36] The New York Central, in exchange for its 5,000 shares of stock in the Beech Creek, received a similar number of shares of preferred stock, and in addition 5,000 shares of common stock. The New York Central also secured $500,000 of bonds of the Pennsylvania Coal and Coke Company.[37] This acquisition by the Pennsylvania Coal and Coke Company meant the increase of the latter's coal fields by nearly 30,000 acres[38] and apparently strengthened the control of the New York Central over the coal properties.

It further appeared that the New York Central owned the en-

34 Testimony before the Commission re coal and oil under authority of Joint Res. 32 (59th Cong., 1st Sess., appears only in typewritten form—17 Vols.), Vol. 10, p. 4499.

35 Do. Vol. 9, p. 4691.

36 Do. p. 4634.

37 Do. p. 4649.

38 Do. p. 4652.

tire capital stock of the Gallitizin Coal Company and a majority interest in the West Branch Coal Company, both corporations being capitalized at $50,000 each.[39]

The method of car distribution, while not so arbitrary as on the lines of the Baltimore and Ohio, was not entirely satisfactory. In general, cars were distributed on a tonnage basis, ratings being made, however, by railway employees, many of whom were declared to be inefficient and inaccurate.[40] The distribution was not posted and was subject to change at any time.[41] It appeared, however, that all cars received, except in the case of the Clearfield Coal Corporation, were properly charged against the mine receiving them. The reservation applied to cars delivered to the Clearfield Coal Corporation for the railroad's fuel coal.[42] A degree of discrimination necessarily arose from the custom of crediting large operators with the full capacity of all the mines under their control whether all were actively operated or not. This enabled large shippers to concentrate their entire quota of cars at a few mines. The custom resulted in giving the big operators a larger proportion of available cars than their actual tonnage merited.[43] Prospective operators, however, appeared to receive a fair degree of encouragement to enter the field. No fixed policy appeared but all the facts were apparently considered and cars supplied and connections made, if the case seemed to merit it.[44]

6. The Buffalo and Susquehanna Railroad Company.—The Buffalo and Susquehanna was likewise found to be interested in coal mines through control of their stock, no mines being operated directly.[45] No ownerships of stock by officials or employees appeared, if we except such holdings as railway officials possessed to qualify them to be directors in the coal companies.[46] Through ownership of all the stock in the Buffalo and Susquehanna Coal and Coke Company, this railway controlled the entire coal min-

39 Testimony before the Commission re coal and oil under authority of Joint Res. 32 (59th Cong., 1st Sess., appears only in typewritten form—17 Vols.), pp. 4504, 4500, 4517, 4882.

40 Do. pp. 4545, 4546.

41 Do. Vol. 9, p. 4550.

42 Do. p. 4571.

43 Do. Vol. 1, pp. 53, 54.

44 H. D. 561, p. 65, 59th Cong., 1st Sess.

45 Same as (39), Vol. 12, p. 6298.

46 Do. Vol. 12, p. 6298.

ing situation on its own lines. A part of the property owned by the coal company was operated by the Buffalo and Susquehanna Coal Mining Company, all the latter's stock being owned by the former.[47] Another concern, the Powhatan Coal and Coke Company, capitalized at $100,000 and operating on the lines of the Buffalo and Susquehanna railroad was found to be controlled by the coal company of the same name.[48]

No independent lines were operated on the lines of the Buffalo and Susquehanna Railroad, although individuals not connected with the railroad owned large acres of undeveloped coal lands.[49] It did not appear that these owners were refused facilities. The road was comparatively new, having been completed in July, 1905,[50] and officials testified that no application by independents had been received. They declared their willingness, however, to provide proper transportation facilities for independents on application.[51]

7. The Buffalo, Rochester and Pittsburgh Railway Company.—The Buffalo, Rochester, and Pittsburgh likewise possessed large stock interests in certain coal mines. The only private holdings of railway officials were those of President A. C. Yates, who held stock in the Pittsburgh Gas and Coal Company.[52] The railway owned practically all of the 4,000,000 shares of the Rochester and Pittsburgh Coal and Iron Company,[53] and through this ownership controlled a majority of the stock of the Jefferson and Clearfield Coal and Iron Company. These two companies produced practically all the coal that was mined on the lines of the railroad. It amounted to something over 16,500 car loads per year out of a total of 18,400 produced in this region.[54]

There appeared to be no set system of mine rating or car distribution[55] and there was much complaint on the part of inde-

47 Testimony before the Commission re coal and oil under authority of Joint Res. 32 (59th Cong., 1st Sess., appears only in typewritten form—17 Vols.), Vol. 12, p. 6298.

48 Do. p. 6298.

49 Do. p. 6294.

50 Do. p. 6290.

51 Do. p. 6296.

52 Do. p. 1695.

53 Do. p. 1684.

54 Do. p. 549.

55 Do. Vol. 4, pp. 1679, 1691.

pendent shippers that they were unable to secure a sufficient number of cars to handle their coal.[56] It was also clear that the opening of new mines by independents was discouraged.[57] The railroad had a practical monopoly of the coal situation on its lines and frankly managed its equipment for the best interests of the mines which it controlled through its stockholdings.

8. The Pittsburgh, Shawmut and Northern Railroad Company.—The Pittsburgh, Shawmut, and Northern owned no coal mines directly but possessed large stock interests. No evidence was adduced showing that stock ownership in mines was practiced by railway officials or employees. The railroad had 209 miles of track extending from Whalen (on the Delaware, Lackawanna and Western Railroad), New York, to the Elk County Coal fields.[58] It owned all the capital stock of the Kersey Mining Company, a corporation which controlled 15,000 acres of coal land, and likewise all the capital of the Shawmut Mining Company, the latter controlling about the same acreage of coal lands.[59] This road seems to have been constructed for the specific purpose of operating the coal mines in this territory, practically all of which were completely under its control.

9. The Pennsylvania Railroad Company.—The facts brought out with reference to the Pennsylvania Railroad were in general very similar to those above concerning the Baltimore and Ohio and other bituminous roads. No cases of direct ownership of coal mines were found, but very close relations with certain mining concerns existed on account of stock control. It was further shown that many officials and employees had acquired more or less extensive interest in mining concerns on the lines of the railway.[60]

Interests through stock ownership included, the entire capital stock of the Manor Real Estate and Trust Company, a corporation owning about 9,000 acres of coal lands in Pennsylvania; the entire capital stock of the Susquehanna Coal Company, a corporation capitalized at $2,136,800, and operating in the anthra-

56 Testimony before the Commission re coal and oil under authority of Joint Res. 32 (59th Cong., 1st Sess., appears only in typewritten form—17 Vols.), Vol. 5, p. 2634.

57 Do. Vol. 5, pp. 2612-2625, 2608.

58 Do. Vol. 9, p. 4878.

59 Do. p. 4878.

60 Do. Vol. 10, p. 5306.

cite region of Pennsylvania, thus affording the Pennsylvania Railroad an important connection with the anthracite group;[61] and the entire capital stock of the Summit Branch Mining Company; and a controlling interest in the Mineral Railroad and Mining Company.[62]

The Commission classified employees' interests as follows: (1) Such as have been acquired by officers or employees by purchase, full purchase price being paid for stock or property; (2) shares secured very cheaply with the understanding that the names of purchasers were to be used in floating the companies; and (3) shares given to officers and employees outright for the purpose of uniting the interests of the railroad with those of the coal mines.[63]

The first vice-president testified before the Commission that it had been the policy of the Pennsylvania since about 1874 to encourage officers and employees to invest their surplus funds in interests along their lines.[64] Coal mine operators, noting the effect of such interests, sought to place shares of stock, gratis, or at very low cost, in the hands of railway men. Promoters would cast around, from high officials to local car distributors, picking out those whose favor would probably be of greatest assistance in floating the undertaking and, later, in transporting the product.[65] It soon came to be recognized among independent operators that stock so disributed was not in vain; and that coal companies following this policy prospered to a greater degree than competitors not having these associations.[66]

Specific incidents developed in which coal companies gave stock outright to railway men. One, John Lloyd, an independent operator, in his testimony before the Commission regarding a gift of a block of stock valued at $25,000 to a superintendent of the Pennsylvania Railroad, said, "I thought it was a good business move," and, answered in the affirmative a further inquiry as to whether such a motive was the moving sentiment in the distribution of such favors among officers of the Pennsylvania Railroad

61 Testimony before the Commission re coal and oil under authority of Joint Res. 32 (59th Cong., 1st Sess., appears only in typewritten form—17 Vols.), Vol. 9, p. 4892; Vol. 10, p. 5305.

62 Do. Vol. 6, p. 3149.

63 H. Doc. 561, pp. 21-23, 59-2.

64 Same as (61), Vol. 8, p. 3950.

65 Do. Vol. 7, p. 3626.

66 Do. Vol. 8, p. 3752.

Company.[67] Other similar cases came out in the testimony.[68] In some cases money was given outright for this influence.[69] In the particular case here cited, it appeared, however, that the employee was summarily discharged; but other flagrant cases occurred.

In some of the departments having to do with the placing of cars, the purchasing of railway fuel supplies, etc., a regular system of fees seems to have become established. One employee, having in charge the purchase of fuel supplies, testified that he had received from fuel companies during three years about $11,000 in stock, and over $46,000 in money. It appeared from his testimony that a rate ranging from three to five cents per ton had frequently been given by certain coal operators favored by his orders for the railroad. He testified that he had refused these gifts for a time but they seemed to be customary and he finally decided to accept them.[70]

In June, 1906, while the Commission was carrying on this investigation, the board of directors of the Pennsylvania appointed a committee to investigate conditions to which objection had been raised, declaring that "the keen competition of to-day requires every officer and employee of the railroad company, to part with any investment which he had in the shares of any coal-producing company and also to part with any interest which he has in or with any firm, or individual, mining coal on any of the lines of the Pennsylvania Railroad system; and every officer and employee should be required to refrain from any investments whatsoever which may possibly prejudice or affect the interests of the company or interfere with the company's full discharge of its duty to the public."[71]

A short time after the action of the board of directors the president issued an executive order prohibiting the acquiring or holding of such interests; adding, however, "when the holding of such interest might in any way conflict with their duty to the company or the company's duty to the public." This proviso, of course, took much of the force from the order.[72] Very few would

67 Testimony before the Commission re coal and oil under authority of Joint Res. 32 (59th Cong., 1st Sess., appears only in typewritten form—17 Vols.), Vol. 8, p. 4184.

68 Do. Vol. 6, p. 3242; Vol. 9, pp. 4907-4911.

69 Do. Vol. 9, pp. 4969, 4784.

70 Do. pp. 4798, 4799.

71 Annual Report of the Pennsylvania Railroad for year ending June, 1906; also H. Doc. 561, 59th Cong., 2d Sess.

72 H. Doc. 561, 59th Cong., 2d Sess.

acknowledge or even believe that their holdings would interfere with a proper performance of their duties. It is probable, therefore, that it made little or no difference in the attitude of officials and employees toward the acquisition and holding of coal stock.

The individual car abuse was found to have reached greater development on the Pennsylvania than on any other roads here considered. Over 26,000 such cars were found to be in operation, and in addition, about 1,400 cars were owned by the Susquehanna Coal Company, which not only mined but marketed its own coal.[73] It will be remembered that this road was nothing more than a creature of the Pennsylvania. Outside of abuses resulting from the use of private cars, the general system of car distribution was very unsatisfactory and unfair. Officials claimed that the system had been revised in May, 1906, allotments being thereafter based largely on shippers' claims as revised after examination by a railroad engineer. A committee of railroad officials was claimed to consider the data thus supplied and make the assignments.[74]

Testimony before the Commission brought out numerous examples of positive refusal to supply a fair proportion of cars; and under certain circumstances failure to supply any at all. A typical case was cited when there was an unusually heavy demand for cars. The available supply on the lines of the Pennsylvavnia was restricted absolutely to 122 mines owned by 42 operating companies. For six weeks 379 mines received no cars. It was brought out in testimony before the Commission that no mines in which the railway or its officers were interested lacked cars during the six weeks. During this period, 2,200 cars were sold or leased to three mining companies to be used as individual cars. The Keystone Coal and Coke Company received an allotment of these cars. Investigation demonstrated that large amounts of its stock had been placed in the hands of railway officials.[75] During this period all attempts of private operators to secure equipment

73 Testimony before the Commission re coal and oil under authority of Joint Res. 32 (59th Cong., 1st Sess., appears only in typewritten form—17 Vols.), Vol. 8, p. 3949.

74 Do. Vol. 7, p. 3347; Vol. 12, p. 6401.

75 Do. Vol. 8, pp. 3852, 4409.

failed absolutely.[76] Some of them were forced to sell some of their plants to meet maturing obligations; others closed down.[77]

The attitude of the Pennsylvania with regard to sidings and switches was about the same as that of the Baltimore and Ohio. The second vice-president testified that prospective operators requesting sidings had been "discouraged.....as far as possible."[78] In some cases sidings were positively refused. Evidence was not submitted, however, to show that a siding was ever refused to a mining concern in which railway officials or employees held stock. Cases were cited where expensive sidings (in one case costing $16,600) were constructed for mines in which officials were interested.[79]

10. **Inter-Railway Relations in the Bituminous Fields.**—As already indicated the Pennsylvania was the controlling factor in bringing about harmonious relations among these roads in order to eliminate competition and the consequent cutting of rates. With this expressed object it set about the purchase of shares of stock in competitive roads and an interchange of directors.[80]

An investigation of the actual results of this plan disclosed the following facts: The Pennsylvania and its subsidiary companies had secured control of 338,500 shares, or 38 per cent, of the capital stock of the Norfolk and Western; 156,000 shares, or 25 per cent, of the Chesapeake and Ohio; and 696,994 shares, or 37.6 per cent, of the Baltimore and Ohio.[81]

The New York Central and Hudson River Railroad Company and its subsidiaries owned 125,000 shares, or 20 per cent, of the capital stock of the Chesapeake and Ohio; and 606,650 shares, or 22 per cent, of the Reading. The Baltimore and Ohio owned a similar amount of Reading stock.[82]

From consideration of the above it appears that the Pennsylvania and the New York Central acquired a very powerful influence in the bituminous field, the Pennsylvania owning 38 per cent interest in the stock of the Norfolk and Western and the

76 Testimony before the Commission re coal and oil under authority of Joint Res. 32 (59th Cong., 1st Sess. appears only in typewritten form—17 Vols.), President of the Penn. Coal & Coke Co., Vol. 9, pp. 4410-4412.

77 Do. Vol. 8, pp. 4179, 4209-4216.

78 Do. Second Vice-President, Vol. 7, p. 3383.

79 H. Doc. 561, p. 67, 59th Cong., 2d Sess.

80 Do. pp. 43, 44.

81 Do. p. 46.

82 Do.

same amount in the Baltimore and Ohio; the New York Central and Baltimore and Ohio owning about 43 per cent of the capital stock of the Reading; and the Pennsylvania and New York Central together owning about 45 per cent of the capital stock of the Chesapeake and Ohio.

All the great bituminous roads under the leadership of the Pennsylvania, in order to secure a firmer grasp upon the situation and especially to control coal rates to the Atlantic seaboard, joined together in the so-called Tidewater Bituminous Coal Traffic Association.[83] The agreement apportioned to each carrier a certain percentage of soft coal tonnage and there appeared to be an effectual understanding as to rates to tidewater.[84] Rates were shown to have increased about one-half cent per ton under the operation of this association. The agreements have so far been permitted to exist although the actual result accomplished would seem to establish the relationship as in restraint of trade.

Regarding the interchange of directors, it was found that four directors of the Pennsylvania Railroad were directors in the Baltimore and Ohio; two directors in the latter were officers in the former; two officers of the New York Central and Hudson River Company were directors in the Baltimore and Ohio; and the remaining two directors of the Baltimore and Ohio were president and vice-president, respectively, of the Chesapeake and Ohio. It further appeared that three of the five members of the executive committee of the Norfolk and Western were officials in the Pennsylvania.[85]

This seemed to leave the Pennsylvania the dominant factor in the coal situation in Pennsylvania, Western Maryland and Northern West Virginia. Specific evidence was not adduced to show that the Pennsylvania was able, through its stock holdings or the relationship indicated above, absolutely to dominate the coal sit-

83 This association was organized in 1896 and included the following lines; the Pennsylvania, the Philadelphia and Reading, the Beech Creek Division of the New York Central, the Baltimore and Ohio, the Chesapeake and Ohio, and the Norfolk and Western; Testimony before the Commission re coal and oil, under authority of Joint Res. 32 (59th Cong., 1st Sess., appears only in typewritten form—17 Vols.), Vol. 1, pp. 2-4.

84 Testimony before the Commission re coal and oil under authority of Joint Res. 32 (59th Cong., 1st Sess., appears only in typewritten form—17 Vols.), Statistician of the Tidewater Bituminous Coal Traffic Association, Gen'l Manager of the Penna. R. R., Traffic Manager of the Penna. R. R., and Vice-Pres. of the Reading Co., Vol. 1, pp. 2, 90, 43, 82, 210.

85 H. Doc. 561, pp. 44, 45, 59th Cong., 2d Sess.

uation to the extent of preventing the product of certain mines in West Virginia or other sections from coming into competition with that produced on its own lines; nor was it shown that the combination was able to control rates and services to anything like that degree prevailing in the anthracite fields. It will be remembered that the former charge was brought by certain West Virginia operators.[86]

Although positive evidence of monopoly control by any one or two of these railroads was not shown, it did appear very evident that the common carriers controlled the coal situation in their respective territories. Furthermore the degree of harmony resulting from interholdings of stock, interchange of directors and officials, and the formation of traffic associations, all binding the railways together in community of interests, was sufficient to prevent anything like rate wars or even active competition. The combination headed by the Pennsylvania Railroad was operated, in the opinion of the Commission, to increase freight rates to independents, and the price of the product to the consumer.[87] It was further demonstrated that mining concerns out of harmony with the railways and having no affiliations with them, did not prosper, and in some cases were forced to discontinue operations because facilities were not available.

V. The Western Bituminous Fields.

We may now give brief consideration to the relation of the railways west of the Mississippi to coal mining interests along their lines. The system of federal and state distribution of lands, including land grants for railway construction, complicates the situation in this territory. Section 2347 of the Revised Statutes of the United States provides that any citizen or prospective citizen above 21 years of age, or any association duly qualified, may enter upon vacant coal lands, not otherwise reserved; that entries for each individual shall not exceed 160 acres, and for each association, 320 acres; and that such parties shall pay not less than $10.00 per acre for land over fifteen miles from a railroad, and not less than $20.00 for lands within fifteen miles.

Unless very strictly administered there are many possibilities

86 Chapter III, Section 3, also Cong. Rec., 59th Cong., 1st Sess., pp. 1671-1672, 2198.

87 H. Doc. 561, p. 48, 59th Cong., 2d Sess.

of fraud in the distribution of lands under this statute. Interstate Commerce Commissioner Clark testified before the House Committee on Public Lands that thousands of acres of coal land, known to be such, had been entered on declaratory statements by young women and others having no intention to occupy them, and that such entries had been made at the instance of certain companies.[88] He further declared that large areas of coal land had been allotted under state distributive laws on affidavits to the effect that such lands were valuable only for agricultural and grazing purposes, and that in practically all such cases, railway interests were primarily concerned in the coal mines charged with this fraudulent practice.

1. **The Rio Grande Western Railway.**—The Rio Grande Western was found to be controlled by the Denver and Rio Grande Railway Company, the latter being a part of the Gould system. The Rio Grande Western owned the entire capital stock ($10,000,000) of the Utah Fuel Company, a coal mining concern in Utah holding its charter from the State of New Jersey.[89] This company, through fraudulent methods, secured over 1,200 acres of coal lands around its mines at Sunnyside, Utah.[90] It appears in evidence that this land was secured through false entries made by parties at the instance of the fuel company only to be deeded over to the latter. Those making such entries filed affidavits to the effect that the lands contained no coal and were valuable only for grazing and agricultural purposes.[91] Officials of the Denver and Rio Grande testified that they were accustomed to grant special rates to the Utah Fuel Company on the ground that this company was owned by the railway and deserved special consideration.

The Pleasant Valley Coal Company was a corporation subsidiary to the Utah Fuel Company, the latter owning its entire capital stock. This, of course, placed it under the domination of

88 Addresses, Papers, etc., Coal Lands and Coal Land Laws of the U. S., Vol. 2, Sec. 28, p. 2.

89 S. Doc. 450, p. 4, 60th Cong., 1st Sess., re S. Joint Res. 32, Submitted April 28, 1908.

90 Do.

91 Testimony of Commissioner Clark before House Committee on Public Lands, Dec. 17, 1906, Vol. 2, Sec. 28, Addresses, Papers, etc.; also H. Doc. 1450, p. 3, 60th Cong., 1st Sess.

the Rio Grande Western Railway Company through the latter's ownership of the entire capital stock of the Utah Fuel Company. The Pleasant Valley Coal Company employed methods similar to those practiced by the Utah Fuel Company in the acquisition of coal properties. It was testified before the Commission that one, Robert Forrester, an official in the Pleasant Valley Coal Company, had, in less than three years, acted as attorney for seventy-seven parties entering application for lands, and that twenty-eight of these claims were shortly thereafter turned over to the Pleasant Valley Coal Company. In addition it was shown that over 5,500 acres were fraudulently secured around its mines at Cattle Gate, Utah.[92] Various underhanded methods were resorted to in order to evade state and federal checks upon illegal entries.

The Calumet Fuel Company was found to be closely affiliated with the Utah Fuel Company, although the exact relation does not appear.[93] The Wasatch Stone Company was one of the subsidiaries of the Utah and was thus brought under the control of the Rio Grande. All the stock of the Halladay Coal Company was owned by the railway. This means that all coal mining concerns in Utah of any importance were under the absolute control of the Denver and Rio Grande Railroad Company through its subsidiary, the Rio Grande Western.[94]

The entrance of independents into this territory was openly opposed and the situation was so completely dominated that the former were frequently not permitted to run switches or connections over the company's coal properties to adjoining independent mines.[95]

2. The Colorado and Wyoming Railway Company.—The Colorado and Wyoming is a short road about 105 miles in length, running to the central plant of the Colorado Fuel and Iron Company at Pueblo. It was ostensibly constructed for the purpose of hauling the raw and finished products of this plant, and such products constituting practically all its tonnage. The steel plant is capitalized at $50,000,000, all the securities being owned by the Colorado and Wyoming Railway. As a further indication of

92 S. Doc. 450, p. 3, 60th Cong., 1st Sess.

93 Do. p. 4.

94 Testimony of Commissioner Clark before House Committee on Public Lands, Dec. 17, 1906, Vol. 2, Sec. 28, p. 9, Addresses, Papers, etc.

95 S. Doc. 450, pp. 3, 4, 60th Cong., 1st Sess., Do.

the relation between the railway and the Fuel Company it was found that all the leading officers of the former held similar positions in the latter.[96]

It was shown in the evidence that the Atchison, Topeka and Santa Fe, the Colorado and Southern, and the Denver and Rio Grande, by special agreement with the Colorado and Wyoming, and the Colorado Fuel and Iron Company, charged but six mills per ton mile on all coal and coke for the fuel company from the mines of the latter to Pueblo. By agreement the minimum rate was placed at .37½, and the maximum at .56. To all other consumers in Pueblo the minimum and maximum rates from the same points on the lines of these railways were .75 and $1.50 respectively.[97] It was through this advantage that the Colorado Fuel and Iron Company had acquired a monopoly of the steel industry of the state.

The relationship of the several railways entering into this agreement, to the Fuel Company was not fully disclosed in the evidence. It was shown, however, that the president of the fuel company was a director in the Denver and Rio Grande Railroad Company.[98] This community of interests extended at least to the point of coöperation with the fuel company to prevent the extension of railway facilities to independent operators.[99]

3. The Railways of Oklahoma.—Practically all the coal lands in Oklahoma belong to the Indians and are operated on lease. According to an act of Congress not over 960 acres may be leased to one party. At the time of the investigation by the Commission, 109 leases had been executed, 58 being made or later turned over to railroad companies. For the most part the coal mining situation in Oklahoma was found to be dominated by the Rock Island, the Missouri, Kansas and Texas, and the Missouri Pacific, railways.[100]

About 45 per cent of the coal produced from Oklahoma mines was distributed through the McAlester Fuel Company, a selling agency.[1] This concern had great influence in determining the price of all coal produced in this territory. Evidence was intro-

96 S. Doc. 450, pp. 4, 5, 60th Cong., 1st Sess.
97 Do. pp. 5, 6.
98 Do. p. 7.
99 Do. p. 6.
100 Do. pp. 7, 8.
1 Do. p. 10

duced to show that the price of coal was materially raised after this selling agency came into the field. It was not proved, however, that the McAlester Fuel Company was actually affiliated with any railways or was able to secure better facilities than private operators. There was in fact very little complaint on the part of independent operators on account of lack of sufficient cars to handle the output of their mines.

4. The Union Pacific Railroad Company.—The Union Pacific was found to have entered into the business of producing and marketing coal to a greater extent than any western road. The Commission in its report to Congress declared that this railroad absolutely dominated the mining, transportation, and selling of all coal produced on its lines. It appeared in evidence that it, like other western railways, had pursued fraudulent practices in securing much of its coal lands. In 1906 valuable coal deposits were found in Colorado about eight miles from the main line of the Union Pacific and eighteen miles east of Rock Springs. From federal grants the railroad owned large sections of this land. In spite of federal laws limiting the number of acres of coal lands which individuals or associations might receive, the railway by false declaratory statements, signed by parties for a consideration and released to railway officials at the same time or shortly thereafter, secured practically all the additional coal lands of value in this section.[2]

In addition to large direct interests in coal properties, the Union Pacific Railroad Company owned all the capital stock of the Union Pacific Coal Company, a corporation capitalized at $10,000,000, and handled its entire output.[3]

For a number of years the railroad company had secured its fuel from its own mines at Hanna, about 650 miles west of Omaha, and Rock Springs, about 150 miles further west. It also sold a considerable amount of coal from both mines for commercial purposes.[4] About a third of its tonnage came from three independents located at Rock Springs. The Colorado Fuel and Iron Company conceived the plan of extending its holdings to include the three independents. The Union Pacific at once reduced rates from Hanna to eastern distributive points, increasing

2 S. Doc. 450, pp. 17, 21, 60th Cong., 1st Sess.
3 Do. p. 14.
4 Do. p. 15.

at the same time the output of its mines there in order to place the product in the eastern market at a price that could not be met by the Colorado Fuel Company on coal 150 miles further west. Meanwhile rates from Rock Springs, eastward, remained the same, the Union Pacific getting most of its own fuel supply from these mines rather than from Hanna. This forced the Colorado Fuel Company to withdraw, and the owners of the independents finally to sell out to the Union Pacific Coal Company. Officials of this road frankly testified that this had been done at the instance of Union Pacific railway officials to kill out independents on their lines.[5]

These independents were later merged into the Central Coal and Coke Company which has borne varying relations to the Union Pacific, but the dependent operators fearing a protest would make matters worse, did the best they could with the facilities available. After the merger, the Union Pacific first supplied cars to its own mines for fuel purposes; then gave 28 per cent of the remaining cars to the three independent mines, and 72 per cent to the mines of the Union Pacific Coal Company. The railroad seemed satisfied to permit the independents to control these mines on this basis but it was manifestly the policy of the road to discourage and prevent similar acquisitions by other independents.[6]

The condition in the West was found on the whole to be not materially different from that in the East. The railroads in Colorado, Wyoming, Oklahoma, and Utah, which states include the most valuable coal fields, had practically absolute control of the coal mines in these states. They maintained agencies for the mining as well as the marketing of their product, controlling both wholesale and retail prices.[7] The Union Pacific was the largest single owner and operator, and appears to have been more successful in extending its interests. The wide extent of the western coal deposits, the large acreage controlled by the federal and state governments and private individuals have rendered it difficult for any single financial interests to secure control of the situation.

5 S. Doc. 450, pp. 14, 15, 60th Cong., 1st Sess.

6 Testimony of Superintendents of Union Pacific Coal Company; also attempt of the Sioux City and Rock Spring Company, pp. 17, 18; S. Doc. 450.

7 Testimony of Commissioner Clark before House Committee on Public Lands, Dec. 17, 1906, Vol. 2, Sec. 28, p. 9, Addresses, Papers, etc.; also S. Doc. 450, pp. 20, 21; 60th Cong., 1st Sess.

VI. Survey of Relationships Disclosed.

1. **Effect on Independent Coal Operator.**—As we have attempted to show above, the most serious forms of discrimination arose on account of affiliations between railways and mining concerns. These relations forced the independent operator out of the business, (1) by charging him high rates and giving inefficient service, or refusing to furnish any facilities at all; (2) by showing favoritism to affiliated mining interests in regularity and sufficiency of car supplies, appropriation of special or individual cars, better switching connections, lower rates for transportation, standing agreements with affiliated carriers for fuel supplies, and expensively equipped distributive agencies controlled by joint mining and transportation interests, such agencies having peculiar advantages in securing permanent contracts with retail agencies, manufacturing establishments, and so-called "foreign" roads on account, either of certain inter-corporate relations, or the recognition of a "community of interests."[8]

The result of such conditions may very readily be apprehended. The small independent had no chance. Even the well-financed independent had to bid for favor by tying up his output in agreements unfavorable to his interests;[9] or selling stock to railway officials on special terms;[10] and even bribing employees and officials by actual gifts of stock or money.[11] The inevitable result was to force the private operator to the terms of the railway. He was frequently compelled to sell out to the latter in order to meet maturing obligations incurred in his purchase of mining properties and equipment, or else yield a sufficient stock interest to the railway to insure facilities for marketing his product.

The railway's hold on mining properties has, therefore, become stronger and stronger until practically the entire coal interests in the great bituminous and anthracite fields of the producing states have come to be in large measure dominated by the railways serving them. This control was exerted through direct ownership, stock ownership in affiliated coal companies, or favorable agreements with independents for their product. Under such a

8 Such as form junctures with the mineral roads although having no direct connection with coal properties.

9 e. g., contracts of Temple Iron Co. with independents, supra pp. 41, 44, 45, 49, 50.

10 Supra p. 58.

11 Supra p. 54, 58, 59.

régime, a railway may develop those mines or sections of states that appear to its advantage to develop, or withhold such development, as it may choose. The great bituminous and anthracite railways operating in their respective territories under the masterful unifying forces of the Pennsylvania, the Reading, and the Union Pacific will, unless more effectually restrained than by any existing statutes, dominate the coal business throughout the country. There is little or no competition in many fields. The maximum price that the carriers believe will furnish the greatest net profit may now be demanded with impunity, especially for the product of the anthracite fields where complete monopoly has been more nearly established.

2. Effect on Prices to the Consumer.—In a recent report of the Senate Committee on Interstate and Foreign Commerce it is stated that, whereas the increase in wage in the anthracite fields since the Reading combine was but five per cent the retail price of anthracite coal has gone up twenty-five per cent.[13]

The report further submitted an estimate of the various elements of cost entering into the preparation of anthracite coal for the market. Labor cost of mining was placed at $1.10 per ton; other expenses on account of administration, maintenance of equipment, six per cent interest on capital employed, sinking fund, etc., $1.50 per ton; transportation, $0.97 per ton; making a total of $3.57 for placing one ton of coal on the market for the retail trade.[14] If the retailer sell at one dollar advance the total cost to the consumer should not be more than $4.57, instead of the prevailing price of $6.50 to $9.00. It is estimated that 70,000,000 tons of anthracite coal are consumed annually. On this basis, using the smaller figure, it may be seen that the consumer pays each year about $135,000,000 more for hard coal than he should pay, making reasonable allowance for labor costs, interest on capital, transportation, and retailer's profit.

It should be noted, furthermore, that transportation charges on anthracite coal are much higher in proportion than the charge on similar commodities. The tariff on bituminous coal, for instance, from the mines of the Clearfield Company, to Perth Amboy—a distance of 346 miles—is $1.70; although the tariff on anthracite

13 Report submitted June 18, 1912, re S. Res. 98, Cong. Rec., p. 617, 61st Cong., 2d Sess.

14 Report Senate Committee on Interstate and Foreign Commerce, June 18, 1912, pp. 6, 7, 61st Cong., 2d Sess.

coal from the Schuylkill County mines, to Philadelphia,—a distance of 125 miles—is the same. Similarly, anthracite coal is given a higher commodity rate from the mine to distributive points than other commodities which require much more care in handling and which, in other sections of the country, receive the same commodity rate.[15]

The high tariff on anthracite coal acquires especial significance when considered in connection with the sixty-five per cent contracts. As has already been shown, such contracts amount to a very substantial rebate to all operators entering into them. The independent has been practically forced to become a party to such agreements if he would successfully compete with the railway.

3. **Recommendations of the Commission.**—One of the most reprehensible abuses found to exist in the eyes of the Commission appeared to be the assignment of special and "individual" cars. Many of the above forms of discrimination could not exist under a fair and equable apportionment of cars. Notwithstanding the prohibitive executive order of the president of the Pennsylvania, the greatest offender in this regard, it was evident to the Commission from the testimony adduced that the abuse continued.[16] This system was fostered by the custom of granting extra cars for the carrier's own supply of fuel coal. All the railroads above, except the Western Maryland and the New York Central (the latter no exception with regard to the Clearfield Bituminous Coal Corporation) appear to have given extra allotments to companies furnishing railway fuel. This plan, by leaving the usual allowance of cars for the general commercial needs of these mines, was an important consideration in contracting for fuel coal. Whether or not the interests of the carrier and coal producer were mutual, the latter would feel justified in giving cheaper rates if the usual quota of cars could be reserved for carrying coal to its general trade. Back of much of this kind of discrimination, if not all of it, seemed to be the railway's interest in certain coal mines.

In the hope of relieving some of the unwholesome conditions as described above, the Commission recommended that every railroad publish its system of car distribution, as well as car allotments, from time to time; that a just estimate be made of capac-

15 Report of Senate Committee on Interstate and Foreign Commerce re S. Res. 98, June 18, 1912, pp. 7, 8.

16 H. Doc. 561, p. 80, 59th Cong., 2d Sess.

ity, where it is used as the basis, by an independent party and that this investigation be made in the presence of representatives of the mine in question; that individual cars be absolutely eliminated, and that all others be distributed according to clearly defined rules; that carriers or officers or employees be positively forbidden to have any interest whatsoever in any coal properties except such as are maintained solely for the purpose of supplying the railroad in question with fuel.[17]

These recommendations did not include a specific recommendation that railroad corporations be not allowed to hold stock in mining concerns, although on a number of occasions throughout the report it did so express itself.[18] It doubtless regarded it as unnecessary to reiterate in the form of a recommendation what was believed to exist in the law as a positive prohibition.

On July 30, 1915, just as this document goes to press, the Interstate Commerce Commission in accord with an order of Congress of June 10, 1912, submitted a report regarding the "rates, practices, rules, and regulations governing the transportation of anthracite coal" from the Wyoming, Lehigh, and Schuylkill regions in the State of Pennsylvania to tidewater. In this report the relationship of the anthracite roads to the coal companies was succinctly summarized in the following table:[19]

Coal Company.	Owner of Stock of Coal Company.	Par Value of Stock Owned.	Date Stock was acquired by owner.
Lehigh & Wilkes-Barre Co., ...	C. R. R. Co. of N. J.,..	$8,491,150	1874-1909
Philadelphia & Reading Coal & Iron Co., ...	Reading Co., a holding Co., ...	8,000,000	Dec. 1, 1896
Hillside Coal & Iron Co., ...	Erie R. R. Co., ...	1,000,000	Dec., 1895
Pennsylvania Coal Co., ...	Erie R. R. Co., ...	5,000,000	Mar., 1901
Lehigh Valley Coal Co., ...	L. V. R. R. Co., ...	1,965,000	1875-1908
Coxe Bros. & Co., Inc., ...	L. V. R. R. Co., ...	2,910,150	1906
Scranton Coal Co., ...	N. Y. O. & Ry Co., ...	200,000	Feb. 2, 1899
Elk Hill Coal & Iron Co., ...	N. Y. O. & Ry. Co., ...	60,000	Mar. 1, 1899
Susquehanna Coal Co., ...	P. R. R. Co., ...	2,136,800	1873-1886
Mineral R. R. & Mining Co., ...	P. R. R. Co., ...	100,002	1877-1891
Summit Branch Mining Co., ...	P. R. R. Co., ...	25,000	Mar. 12, 1902
Mineral R. R. & Mining Co., ...	N. C. Ry. Co., ...	199,998	1887-1891
Hudson Coal Co., ...	D. & H. Co., ...	2,400,000	1901-1911

17 H. Doc. 561, pp. 80, 81, 59th Cong., 2d Sess.

18 Do. p. 76.

19 Report of I. C. C. No. 4914, decided July 30, 1915, p. 226.

In all cases except the first[20] the carriers as above indicated own the entire outstanding stock of the several coal companies. The Commission summarized its findings as follows:

> "That the rates on anthracite coal, prepared and pea and smaller sizes, in carloads, applicable from producing districts in the Wyoming, Lehigh and Schuylkill regions in the State of Pennsylvania to tidewater ports and certain eastern interior points are unreasonable, and the rates on anthracite coal, prepared and pea sizes, from said districts to other interior points are unreasonable, and reasonable rates fixed for the future.
>
> "That the respondents by means of trackage arrangements and the free transportation to junction points in the mining regions of coal exchanged by their allied coal companies, have extended the advantages of interline transportation to their coal companies to the prejudice of other coal shippers to whom interline transportation at joint rates has been denied. Respondents required to establish through routes and publish joint through rates applicable thereto.
>
> "That anthracite coal is a low-grade commodity which is transported in vast quantities in trains of maximum tonnage. The tonnage loaded in each car is much greater than the loading of most other classes of traffic. Most of the anthracite tonnage is shipped from collieries whose daily production, measured in carloads, is very large. These conditions tend toward lower operating costs.
>
> "That concessions and offsets granted by respondents to their allied coal companies in the form of interest charges, royalty earnings, the use of valuable property at inadequate rentals, the free use of the carriers' funds and credit, or by other means are as pernicious as direct cash rebates. Such concessions and offsets are unlawful.
>
> "That lateral allowances paid to a coal shipper in accordance with an agreement, alleged to be additional compensation for the use of a facility furnished by the shipper, are unlawful rebates."[21]

In view of the facts shown above the Commission prescribed reductions in rates of all the anthracite roads, such reductions ranging from 6 to 25 per cent.[22]

20 The Central owns $8,491,150 of the $9,210,000 stock of the Lehigh & Wilkes-Barre Coal Co.

21 Report of I. C. C. No. 4914, rendered July 30, 1915, p. 220.

22 Do. pp. 285-289.

CHAPTER III.

LEGISLATIVE HISTORY OF THE COMMODITIES' CLAUSE.

I. Preliminary Considerations.

In the enactment of the Hepburn Law of 1906, the last thing seriously considered was the provision now known as the Commodities' Clause. There was little serious discussion in Congress or in the press, or among independent operators, as to the advisability and feasibility of dissociating common carriers from their mining interests. The debates for the most part were taken up with the "maximum rate" proposal, the judicial review of orders of the Commission, the pipe line provision, and the "private car abuse."

It was slow to dawn on Congress that it probably possessed the power to eliminate the vast majority of existing abuses by simply enacting a law dissociating all common carriers, doing an inter-state business, from their mining interests. Early attempts on the part of states to prevent railway absorption of coal deposits availed little.[1]

These statutes were enacted prior to the development of the great transcontinental systems operating in inter-state commerce. Railways were then local concerns and the businesses of mining and transportation were regarded as amenable only to state control. The appearance of inter-state railways removed a part of the problem of regulation from the state and placed it upon the federal government.[2] It was some time, however, before the latter was sure of its authority to enter the field of general regulation; then it did not understand the complexity of the situation, and great pressure from the interests involved discouraged the enactment of such corrective measures as would vitally affect industrial and property relations.

The real problem of these inter-corporate relations is, in fact, so complex that improperly considered legislation might precipi-

1 Penn. Const., Art. 17, Sect. 5; Revised Statutes of W. Va., Code of 1899, Chapter 54, Sec. 66b.

2 U. S. Const., Art. 1, Sec. 8, giving Congress power to regulate commerce between the states.

tate such disorganization and panic as would threaten our very industrial existence. An evil of more than a half century's growth, ingrained in the very warp and woof of our commercial and industrial fabric can not be summarily eradicated by hasty legislation. It was a serious and comprehensive issue that faced Congress in the spring of 1906 when public sentiment demanded action.

From 1887 to 1906 the Commission made no specific recommendation to Congress for legislation forbidding carriers from engaging in industries entirely apart from their transportation functions.[3] On the opening of the session witnessing the passage of the Hepburn Law, of which the clause in question was a part, the Commission, in answer to a request from the Senate Committee on Interstate Commerce, drafted a number of amendments, which in the opinion of the former should be passed. The letter of transmittal made no reference to legislation to prevent carriers from engaging in other lines of business.[4]

None of the commissioners in their testimony before the Senate Committee on Interstate Commerce, prior to the enactment of the inter-state commerce law, introduced the question. Commissioner Prouty, in answer to a question put by Senator J. P. Dolliver, said, "No, I do not much think that it is (right); but they are in a great many cases, not only in the anthracite coal roads in Pennsylvania, but it is the case with the bituminous roads out West and in a great many places."[5]

It must be said in behalf of the Commission that it was not clothed with authority to investigate matters pertaining to the monopolization of an industry or to restraint of trade; nor did it possess adequate authority to require railroads to submit data touching upon contracts and agreements which might exist between railroads and other concerns having nothing to do with transportation. It can not be doubted, however, that sufficient evidence had been adduced before the Commission from time to time to raise strong suspicion if not positive conviction in the

3 Annual Reports of the Commission, 1887-1906.

4 General Letter Book of the Commission, No. 55, 1905, p. 52. This letter does not appear among congressional documents and may be found only at the Interstate Commerce Library.

5 Hearings before Commission on Interstate Commerce, re S. Res. 288, concerning the regulation of railway rates, Vol. 4, p. 2883, 58th Cong., 3d Sess.

minds of the Commissioners that the carrier's interest in mining concerns frequently lay at the bottom of unfair car distribution and discrimination in rates.

In the case of the Atchison, Topeka and Santa Fe Railway Company before the Commission, on charges made by the Caledonian Coal Company, such discriminations were shown in favor of the Colorado Fuel and Iron Co., that the railroad's financial interest in the latter company could not but be detected.[6] The cases of the Red Rock Fuel Company against the Baltimore and Ohio Railroad;[7] the New York, New Haven and Hartford against the Chesapeake and Ohio,[8] and the earlier Haddock and Coxe cases,[9] must have impressed the Commission with the fundamental reason for the abuses charged. The last two cases named arose in 1890 and 1891, respectively, and were concerned with abuses arising out of the mineral interests of the Lehigh Valley and the Delaware and Lackawanna Railways in the anthracite fields. The facts were very clearly brought out before the Commission but the latter waived the power it might otherwise very properly have claimed to have been conferred by the original Interstate Commerce Act and simply recognized as lawful "the commingled attributes of carrier and producer," as existing in railroads. This was taken by carriers as a license to continue this practice, and by the courts as a construction of the law by an administrative body which should be given a degree of respect.[10]

Prominent railway officials of important roads not closely connected, however, with large mining interests, were very positive in their disapproval of such joint interests. One said, "I think that every railway official in this country should be disqualified from having any interest, directly or indirectly, in any large producer of traffic, whether it be a coal mine or a factory or a mill or anything else, on a line of railway, where he is on the pay roll."[11] Another believed that the distribution of products should be separated; "that it is the business of the railroad to carry

6 Opinions of the Commission, Vol. 11, No. 789.

7 Do. Opinion 812.

8 200 U. S., p. 361.

9 3 I. C. R. 302; Do. 460.

10 Opinion of Supreme Court in N. Y. and H. R. R., 200 U. S. 361.

11 J. J. Hill, before Senate Committee on Interstate Commerce re S. Res. 288, concerning the regulation of railway rates, Hearings Vol. 2, p. 152, 58th Cong., 3d Sess.

other people's goods and not to engage in competition with those producers in the production."[12] Another testified before the Senate committee: "My personal opinion always has been that the attention of everybody on the railroad should be kept practically confined to the two rails, and to do nothing else. I have always discouraged the railroad going into anything but the practical transportation of freight."[13]

II. Proposals in the House of Representatives.

The situation[14] as above presented was regarded as sufficiently serious to cause a resolution to be introduced in the House of Representatives requesting the Attorney General of the United States to furnish information concerning certain coal roads.[15] This resolution was promptly referred to the Committee on Interstate and Foreign Commerce from which it was not reported. Twelve days later Mr. Gillespie attempted to present a privileged resolution to the same effect. As such it was ruled out of order because, in the opinion of the chair, it called upon the Attorney General for the expression of an opinion.[16] Later in the day it was presented in regular order and was again referred to the committee. Impatient at the delay, Mr. Gillespie slightly modified the measure to avoid the objection before raised by the chair, and again submitted it, this time as a privileged resolution addressed to the President and simply calling for a report as to an alleged merger of the Pennsylvania and other bituminous roads. It was passed without roll call on the same date.[17]

12 Lucius Tuttle, Pres., Boston and Maine R. R., Main Central R. R., and Washington County Ry. and others, p. 958, 58th Cong., 3d Sess., Senate Hearings.

13 Kruttschnitt, Vice-Pres., Southern Pacific, Senate Hearings, Vol. 4, p. 3115, 58th Cong., 3d Sess.

14 Several unsuccessful attempts have been made to secure additional and more immediate facts as to the introduction of this resolution at this time. They do not appear in any of the records and those who should know are not disposed to disclose the information. Conditions alleged to exist in the West Virginia coal fields and partially substantiated in the opinion of the Commission rendered Nov. 25, 1905, in the Red Rock Fuel case (infra p. 81) are doubtless partially responsible for this awakening.

15 H. Res. 125; 59th Cong., 1st Sess.; Cong. Rec. p. 779, presented by O. W. Gillespie.

16 Cong. Rec. 59th Cong., 1st Sess., p. 1240.

17 H. Res. 4, Cong. Rec. p. 1701, 59th Cong., 1st Sess.

Representative W. P. Hepburn, in defense of the refusal of the committee to report the resolutions referred to it, said, "It (the committee) has been engaged upon public matters.....perhaps of superior importance, and the chairman of that committee did not regard the matter as important.....that is, in the sense of hurried action on the question."[18]

A very determined effort was made to secure a reconsideration of the vote, but without avail.[19]

This resolution, although rather indefinite as to the character of information desired, aroused much interest in Congress, and incidentally received some attention in financial circles. A sharp decline was at once felt in railroad stocks obviously interested in the resolution. Reading stock dropped six and one-fourth points; Lehigh Valley, $2.00 per share; and Pennsylvania two points.[20] The financial interests were evidently agitated. One of the most prominent organs of these interests referred in very bitter terms to the action of the House in passing the resolution. "Such wholesale hazarding of vast invested and property rights," it said, "threw a sense of violence and trickery over the whole transaction, as if instigated by a bearish clique intent chiefly on breaking the stock market, which of course it did. Then too, the resolution coupled the President's name with the attack, as if he had instigated it—an ingenious device for redoubling the force of the blow. This haste and manner of proceeding took away from the accused every opportunity of self protection, violated every vestige of justice due any company or individual whatever be the charge."[21]

Such an attitude is significant, especially when the resolution simply presented a request for information concerning the relations among certain bituminous roads.

On the following day, Mr. Gillespie introduced another resolution calling for more specific data. This resolution authorized the President of the United States to direct the Interstate Commerce Commission to discover whether common carriers doing an interstate business, or officers or employees of such carriers, own or have any interest in the bituminous coal mines producing the coal

18 Cong. Rec., 59th Cong., 1st Sess., p. 1702.
19 Journal of Commerce and Commercial Bulletin, January 30, 1906.
20 Commercial and Financial Chronicle, Feb. 3, 1906, p. 238.
21 The Commercial and Financial Chronicle, Feb. 3, 1906.

carried over their lines.[22] This resolution was at once referred to the Committee on Interstate and Foreign Affairs, and was likewise not reported.[23]

Other resolutions of like tenor followed in quick succession. An element in the lower House was certainly aroused. Representative P. P. Campbell, of Kansas, presented a resolution applying to the bituminous roads, somewhat similar to the Gillespie resolution though broader in its scope. It found its way at once to the Committee on Interstate and Foreign Commerce and did not again see the light.[24] Representative W. S. McNary, of Massachusetts, appeared with an even more direct resolution addressed to the President and requesting him to direct the Interstate Commerce Commission to ascertain whether the anthracite coal-carrying roads controlled the production of anthracite coal by direct or indirect ownership or control of coal mines or coal-mining companies. The resolution requested specific information as to whether such ownership or control, if found to exist, did not lead to discrimination in the manner of car distribution, and ultimately to forcing independent operators out of business.[25] This was the first resolution applying specifically to the anthracite roads and it was the most direct and business-like of any of this series. It was, however, lost in committee.

An amendment was introduced, several days before the passage of the general rate measure then before the House. It simply provided that no railway official or employee should be "interested directly or indirectly in the furnishing of material or supplies to such (mining) company."[26] It was at once blocked, Mr. Hepburn, chairman of the Committee on Interstate and Foreign Commerce, explaining that it was agreed by the committee that no amendments were to be permitted. He stated that he approved of the purpose of the amendment "as an original proposition, but," he added, "I know (it) will secure dissent somewhere and create opposition against the bill."[27] The amendment was therefore withdrawn without coming to a vote and the general rate

22 H. Res. 260, 59th Cong., 1st Sess.
23 Cong. Rec., 59th Cong., 1st Sess., p. 2198.
24 H. Joint Res., 101, 59th Cong., 1st Sess., p. 2705.
25 H. Res. 276, 59th Cong., 1st Sess.
26 Cong. Rec., 59th Cong., 1st Sess., p. 2090.
27 Do. pp. 2256, 2257.

bill then pending, known as the Hepburn Bill, was passed by the House without the Commodities' Clause.[28]

III. Senate Discussion and Action.

The railway bill was reported out of the Senate Committee on Interstate and Foreign Commerce without amendment. Senators B. F. Tillman and Stephen B. Elkins, members of the committee, in reporting the measure to the Senate, gave their views as to additional legislation necessary. The former declared that "there should be a provision.....to divorce absolutely the business of transporting freight as a public carrier and the business of producing freight to be transported.....No public carrier engaged in interstate commerce should be allowed to produce and transport any article for sale," beyond such supplies as were necessary for its own consumption.[29]

Senator Elkins, in submitting the views of the majority of the committee, declared that "The bill should compel the separation of the business of railway transportation from the business of manufacturing or otherwise producing the article transported." The report further recommended amendments to "divorce transportation and production by restricting public railway carriers to the performance of their functions as such and restraining them from entering the fields of mining and manufacturing, or in any other way becoming competitors with those to whom their services are offered and sold."[30]

It would seem somewhat surprising in view of these expressions from the two factions in the committee, that resolutions calling for investigation and bills designed to accomplish the separation of the business of common carriers from that of producers, should be so difficult of passage. The events of the several weeks preceding and the manifestations of interest discussed below, are, doubtless, of importance in inducing both parties to commit themselves to legislation designed to alleviate certain abuses arising from this joint ownership and operation.

28 Cong. Rec., 59th Cong., 1st Sess., pp. 2303, 2304.

29 S. Res. 1242, Part 1, p. 11, 59th Cong., 1st Sess.

30 S. R. 1242, 59th Cong., 1st Sess., Part 2, pp. 3-10. It should be stated that the Elkins minority report was not actually presented to the Senate until June 28, 1906, just one day before the final passage of the Hepburn Bill (p. 9505, June 28, 1906). The report bears date of Feb. 27.

Some weeks after the discussion started in the House, Senator Tillman presented a letter from the president of the Red Rock Fuel Company, of Upshur County, West Virginia, which charged that the company was unable to develop its 4,000 acres of coal lands on account of the refusal of the Baltimore and Ohio Railroad to make proper connections between the tracks of the railroad and the private switches of the mining company, even though the latter had agreed to pay the entire cost of making such connections; that the Baltimore and Ohio "owned a controlling interest in various coal companies along its line of railroad;" and this railroad was engaged in marketing its own product.[31]

The Red Rock Fuel Company case had already been before the Interstate Commerce Commission. The latter made an order requiring the railway to discontinue such discriminations, allowing the former one month in which to furnish the connection requested.[32] Proceedings before the Commission in this case indicated that the Baltimore and Ohio was controlled by the Pennsylvania, and that the policy of the latter was to prevent competition with coal mines on its own road.[33] This contention is only partially substantiated by the report of the Commission to the President in answer to the Gillespie resolution in which it appeared that the Pennsylvania System owned about $70,000,000 of the $183,000,000 stock outstanding.[34]

Agitation on account of the Red Rock Fuel Company letter led the Governor of West Virginia to declare with reference to the general situation in his state,

> "that an investigation would show that the Baltimore and Ohio Railroad Company is interested in the production of coal.....It may be that the Pennsylvania does not legally own a controlling part of the stock of the Baltimore and Ohio Railroad Company, or the C. & O. Ry. Co., or the N. & W. Ry. Co., but I have no doubt that an investigation will show that the Pennsylvania Railroad Company practically controls these three great trunk lines which traverse West Virginia.....Hence it is a fact that West Virginia is to-day in the grasp of a railroad trust which practically says what part of the state shall be developed, and what shall not be developed, how much coal shall be shipped out

31 Cong. Rec., 59th Cong., 1st Sess., pp. 1671-1672.
32 Decision No. 812, Vol. 11, Nov. 25, 1905.
33 Cong. Rec., 59th Cong., 1st Sess., p. 1672.
34 H. Doc. 475, 59th Cong., 1st Sess.

of the state, to what points.....it shall be shipped, and when....."[35]

In view of the conditions alleged to exist in West Virginia, Senator Tillman stated that he would move for a Senate, or a joint, investigation, if the House should fail to order the investigation called for in the Gillespie resolution. When it appeared that the House would not pass a comprehensive measure for an investigation, the Tillman resolution was offered in the Senate. It was a far-reaching provision, ordering an elaborate and detailed investigation into all forms of alleged relationships sustained by railways and railway officials toward mining interests, all agreements or conspiracies among any roads looking to the monopolization or the control of coal mines or coal or any other traffic, and all customs and practices of granting transportation facilities that appeared to be unfair or discriminatory in their nature.[36]

35 Letter to Sen. Tillman, Cong. Rec., 59th Cong., 1st Sess., p. 2276.

36 This resolution authorized the Commission to ascertain, "First, whether any common carrier.....subject to the .....act.....own or have any interest, by means of stock ownership or otherwise in other corporations, or in any of the coal or other products which they.....carry over their.....lines.

"Second, whether the officers or any of the carriers.....or any person .....charged with the duty of.....furnishing facilities to shippers, are interested,.....by means of stock ownership or otherwise, in corporations,.....owning, operating, leasing or otherwise interested in any coal mines.....or.....other traffic over the railroads with which they..... are connected.

"Third, whether there is any contract,.....or conspiracy in restraint of trade or commerce among the several states, in which any common carrier engaged in the transportation of bituminous coal or other products is interested.....; and whether any such common carrier monopolizes or attempts to monopolize.....any part of the trade or commerce in bituminous coal, or other traffic, among the several states, or with foreign nations.....and if so, to what extent such carriers.....limit or control directly or indirectly the output of coal mines or the price of coal.

"Fourth, If the Interstate Commerce Commission shall find that the above facts,.....do exist.....that it.....report as to the effect of such relationship.....upon such person or persons as may be engaged independently of any other person in mining coal and shipping the same..... or upon the general public.

"Fifth, That said Commission be also required to investigate and report the system of car distribution in effect upon the several railway lines engaged in the transportation of bituminous coal or other products.....

The Senate proceeded at once to the consideration of this resolution. It was somewhat similar to the House resolution introduced by Mr. Gillespie, though more specific and far broader in its scope. After a brief discussion, it passed the Senate.[37]

IV. House Amends and Accepts Senate Resolution.

The House Committee on Interstate and Foreign Commerce, notwithstanding its record in refusing to report resolutions of this nature, could not lag behind the Senate. It accordingly took an advanced position by extending the general expression, "other traffic," employed in the Senate draft, to include specifically "oil and oil properties."[38] As thus amended it passed the House and was duly concurred in by the Senate.[39]

It is not improbable that the decision of the Supreme Court, several days prior to this action of the House, in the case of the New York, New Haven and Hartford Railroad Company against the Interstate Commerce Commission, influenced the House to pass a more sweeping resolution for investigation than that demanded by the Senate resolution. This case had to do with the validity of a contract between the Chesapeake and Ohio, and the New York, New Haven and Hartford Railroads, by which the former was to sell and deliver to the latter 60,000 tons of coal at $2.75 per ton from the coal mines in the Kanawha district. It appears from the evidence in the case that the purchase price of the coal at the mines, plus the cost of hauling from Newport News to the point of delivery in Connecticut was $2.47. The difference between this and the selling price left but $0.28 per ton to apply to transportation charges from the mines to Newport News; whereas the published tariffs called for $1.45. The court would not go further than to base its decision entirely upon the departure from the published rates, recognizing, however, that

and whether said carriers.....discriminate against shippers," or prospective shippers" either in the matter of distribution of cars or in furnishing facilities connected with the transportation of coal.

"Sixth, That said Commission.....report as to what remedy it can suggest to cure the evils if they exist." (S. Joint Res., 32-59th Cong., 1st Sess., Cong. Rec., p. 2424, Feb. 12, 1906.)

37 Cong. Rec., 59th Cong., 1st Sess., p. 2431 (Feb. 12, 1906).

38 Do. p. 2885.

39 Do. pp. 2886-2888.

such a construction might "render it difficult, if not impossible, for a carrier to deal in commodities."[40]

It was clearly demonstrated in the House debate, first that the resolution was not designed to go into the coal and oil business except in so far as such business entered into interstate commerce; secondly, that it was not directed against the operation of coal and oil properties by carriers in so far as such operation had to do with supplying fuel for the sole use of carriers engaged in such operations; and thirdly, that it called for a more extensive and special investigation than that employed by the Commission in the usual exercise of its functions.[41] The question was not raised, however, as to whether the Commission should be clothed with additional powers in order to enable it to carry out a line of investigation understood to be more extensive than that contemplated by the original act. It seemed to be understood that a more extensive use of powers already delegated could be properly authorized by Congress and would not require an additional special delegation of authority.

The President of the United States, in his letter of approval expressed in his characteristic manner very serious doubt as to the efficacy of the resolution. "I have," said he, "signed it with hesitation, because in the form in which it was passed it achieves very little and may achieve nothing, and it is highly undesirable that a resolution of this kind shall become law in such form as to give the impression of insincerity—that is, of pretending to do something which really is not done." He objected first, that a part of the investigation requested by the House in a resolution of Feb. 15, 1905, regarding the oil industry, and a further part regarding the anthracite coal industry, were then under investigation by the Department of Commerce and Labor, and that the results would soon be ready for publication; that the Commission would therefore not feel free on account of possible conflict in findings to carry forward such investigation until after the Department of Commerce and Labor should have made its report; that such an investigation as that demanded in the resolution would give "immunity from criminal prosecution to all persons who are called, sworn or constrained by compulsory process of law to testify as

40 N. Y., N. H. & H. R. R. Co. vs. I. C. C., 200 U. S. 361; rendered Feb. 19, 1906.

41 Chas. E. Townsend, Cong. Rec., 59th Cong., 1st Sess., pp. 2886-2888.

witnesses;" that additional authority to administer oaths and compel the attendance of witnesses should be given to the Commission; and that a specific appropriation should be made to enable the Commission to perform additional functions not contemplated in the original grant.[42]

Congress at once set about complying with the President's wishes by the introduction of a joint resolution in both the House[43] and Senate.[44] It appeared to the leaders, however, that a special appropriation was wholly unnecessary, especially in view of the fact that the Commission was in communication with the Committee on Appropriations with a view to submitting to Congress an estimate of funds required together with the request that such funds be provided. This seems to have been the usual procedure and it appeared to be the opinion of the best authorities in the Senate,[45] and of the critics at large.[46] This portion of the resolution was, therefore, stricken out. Congress did not concur with the President's views regarding special provisions in the resolution to empower the Commission to enforce the attendance of witnesses, to administer oaths, etc. Out of consideration for him, however, and the prestige which his views would have if raised in defense of a refusal to testify before the Commission, Congress, after striking out the suggestion regarding a special appropriation, embodied in a joint resolution the President's recommendations.[47] As finally agreed upon the resolution conferred upon the Commission "the same power and authority to administer oaths, to subpœna and compel the attendance of witnesses and the production of documentary evidence, and to obtain full information, which said Commission now has under the act to regulate commerce" as amended by other acts including "an act in relation to testimony before the Interstate Commerce Commission."[48]

The popular press, of course, approved of this action. The

42 S. Doc. 256, p. 3440, 59th Cong., 1st Sess.

43 H. Joint Res. 115, 59th Cong., 1st Sess., Cong. Rec., p. 3655, March 9, 1906.

44 Cong. Rec., 59th Cong., 1st Sess., p. 3669.

45 Do. pp. 3669-3674, 3851, 3852.

46 Journal of Commerce and Commercial Bulletin, March 9, 1905.

47 Cong. Rec., 59th Cong., 1st Sess., pp. 3875-3876 (House); p. 3852 (Senate).

48 Cong. Rec., 59th Cong., 1st Sess., p. 3875.

President, by his shrewd move and bold insinuations had with probable intention, given a thrust to Congress that centered the attention of the entire country upon it. His vigorous language was doubtless prompted by a desire to line up popular sentiment behind the administration in the whole pending rate discussion, with the additional reason, perhaps, of aligning himself with a legislative program that might grow out of this very resolution.

Some of those who had followed closely the progress of the general rate measure in the House had not noted the evolution of that agitation which forced the passage of this resolution. "The resolution was hastily compounded," said one, ..."and put through both houses with little deliberation as a votive offering to the bugbear of popular clamor."[49] The first part of this criticism, at least, appears hardly justified although it expresses well the popular attitude at that time. As a matter of fact it required at least two months to get the measure into form and arouse public and congressional interest sufficiently to pass it. The data produced is sufficient evidence of the effectiveness of the resolution. The only indication of haste in drafting the resolution is to be found in the House amendments adding oil to the list of interests to be investigated, whereas the Bureau of Corporations had already undertaken such an investigation. It appeared to be generally understood, however, that the latter investigation had more special reference to discrimination in service on account of the private tank cars and pipe lines owned by the Standard Oil Company and the special agreements maintained with railways, than the direct ownership and control of oil fields or railways.

V. The Commodities' Amendment to the Pending Rate Bill.

The minority in the Senate, unwilling to await the Commission's report, submitted a proposal for amending the rate bill pending so as to restrain any common carrier engaged in interstate commerce from engaging "directly or indirectly in the business of buying and selling coal or coke, oil or oil properties, or to promise, pledge, or lend its credit, or other property or thing of value to another, either natural or corporate, engaged in such business" or "to in any manner own, control or have any interest in coal lands or properties or oil lands or properties; or to monopolize any part of the trade or commerce in coal or oil, or

49 Journal of Commerce and Commercial Bulletin, March 9, 1906.

traffic therein among the several states, or with foreign nations, or to limit or attempt to control, directly or indirectly, the output of coal mines or oil fields or the price of coal or the price of oil." The amendment also forbade "discriminations against shippers, or parties wishing to become shippers.....either in the matter of the distribution of cars or in furnishing facilities or instrumentalities connected with receiving, forwarding, or carrying coal or oil." An exception, which characterized all subsequent proposals, was made to enable carriers to purchase and handle articles for their own consumption. The prohibitions were intended to apply not only to the railroad as a corporation, but to any officers or employees of the railroad as well. Violations of these prohibitions were made punishable by imprisonment from one to three years.[50] The proposal was laid upon the table on motion of the author and was slightly amended and informally presented several months later.[51]

The Clay proposals were the most drastic of any considered at this time. Later amendments covered practically all these provisions except those forbidding carriers from lending "credit or other property or thing of value to another engaged in such business," and the penalty of imprisonment for violation. The former of these two provisions was taken verbatim from the West Virginia statutes.[52]

The desire of the leaders to head off serious consideration of such radical proposals as were contained in the Clay amendment, probably led Senator Stephen B. Elkins, Chairman of the Committee on Interstate Commerce, to present an amendment containing much more moderate prohibitions. This amendment was designed to prevent common carriers subject to the Interstate Commerce Act from producing, manufacturing, buying, furnishing or selling of coal, or coke, or any other commodity.....in competition with any shipper or producer on its line." It was temporarily laid on the table and reintroduced later with the modification "unless authorized by its charter to do so," and presented for formal discussion on May 7th.[53]

50 Cong. Rec., 59th Cong., 1st Sess., p. 3038. (Submitted Feb. 27, 1906, by A. S. Clay, of Georgia.)

51 Do. p. 6461 (May 7, 1906).

52 Revised Statutes of West Va., Chapter 54, Sec. 66b, Code of 1899.

53 Cong. Rec., 59th Cong., 1st Sess., pp. 4375 (March 28, 1906) 6455-6456 (May 7, 1906).

The author justified this modification on the ground that a law calling for dissociation should not apply where carriers were specifically authorized by state charters to own and operate coal properties. He advanced the very serious suggestion that vested interests had been created by the legalization of such joint holdings, especially since many railroads had been incorporated for the specific purpose of mining and selling coal.[54]

It would appear, however, that such a condition would absolutely nullify the prohibitions contained in the amendment in all states granting such charters. Not only so, but it would have been manifestly unfair to subject carriers operating in other states to a federal law from which certain other states were exempt on account of local statutes. Such a law would undoubtedly be held unconstitutional by the Supreme Court.[55]

The issue thus raised justified very serious consideration of the practicability, the necessity, and the constitutionality of such a law. The attitude of the Supreme Court in the Addyston Pipe and the New York, New Haven and Hartford cases, already cited, leaves little doubt as to the power of Congress to so amend an existing statute as to render it effectual even if such an amendment should require the separation of the business of production from that of transportation. Any other position would mean the subordinating of the power of Congress to control commerce between the states, to state laws, which latter cannot be operative beyond the limits of the states which enacted them.

The great extent of the joint operation of mining and transportation companies by railways was the very problem to be met. Prohibitory laws striking at such local relationships were not only advisable, but absolutely imperative, if the most flagrant sort of discrimination was to be prevented. State statutes or charters, permitting the local development of these abuses and their extension into interstate relations, could not be held to restrain federal legislation to control abuses resulting from such extension. This principle had by this time been very clearly established by decisions of both federal courts and the United States Supreme Court.[56]

54 Cong. Rec., 59th Cong., 1st Sess., pp. 6455-6457.

55 Supra p.

56 a. Reading R. R. Co. vs. State of Penn., 15 Wallace 232, that transportation of traffic between states is subject only to federal supervision (1872). b. Wabash Ry. vs. Ill., 118 U. S. 557, that federal power extended

Senator Elkins finally agreed to strike out the provisions exempting interests acquired under state laws, although he contended for it again in subsequent debates upon his amendment.[57] The Elkins amendment was further modified by a substitute changing the form to meet a constitutional objection that the original amendment prohibited interstate carriers from engaging in certain industries, whereas it should forbid carriers which produce certain commodities from entering into interstate commerce.[58]

A great array of amendments and substitutes followed[59] until the situation became so confused that nobody, not even the secretary, was able to state what the pending amendment was. Senator Tillman, in referring to the situation, said, "I found we had reached a point where we were balled up.....We apparently had got to a point where we could not do anything but talk."[60] In view of this confusion resulting from the multiplicity of amendments suggested, amendments to amendments, and substitutes, Senator Tillman moved to lay everything on the table, giving notice that he would then submit an amendment.[61] By a vote of

to commerce within a state when that commerce effects interstate commerce (1886). c. "Minnesota Rate Case," Fed. Rep., Vol. 5, 184, established limit to state jurisdiction over railways (1911).

57 Cong. Rec., 59th Cong., 1st Sess., pp. 6456, 6457, 6510.

58 The amendment then read: "It shall be unlawful for any common carrier engaged in producing, etc.....to engage in interstate commerce." (Cong. Rec., 59th Cong., 1st Sess., p. 6457). Senator Elkins later disclaimed having accepted this substitute which was proposed by Senator Moses P. Clapp, but the Senate thereafter regarded the Clapp substitute as the Elkins amendment. (Cong. Rec., 59th Cong., 1st Sess., p. 6510).

59 Some of them would specifically limit the application of the law to such products as passed directly from the hand of carriers into interstate commerce, thus permitting holdings and the operation of such holdings by interstate carriers so long as the transactions arising therefrom are confined to the state in which the shipments originate (McLaurin, Cong. Rec., 59th Cong., 1st Sess., pp. 6457-6459; McCumber, p. 6497, Daniels, pp. 6461, 6503); others would postpone the effectiveness of the law, the periods suggested ranging from two to five years (Dryden, p. 6506; McLaurin, p. 6507; Dick, Gallinger, p. 7016); others would postpone any action until the Interstate Commerce Commission should have made its report (Dick, Bacon, Aldrich, Simmons; pp. 6405, 6498, 6499); and others would reject all amendments and call upon the Committee on Interstate Commerce to formulate a bill (Overman, Tillman, Aldrich, Hopkins; pp. 6500, 6512, 6552, 6558).

60 Cong. Rec., 59th Cong., 1st Sess., p. 6512.

61 Do.

51 to 29 the motion was declared in order. The motion to table, however, was lost by a vote of 49 to 29.

On the resumption of consideration of the general rate bill, the chair ruled that the Dryden amendment, placing July 1, 1911, as the effective date of the Commodities' Clause, was before the House. The question was put and, amidst some confusion, the amendment was passed. On call for the yeas and nays, Senator Dryden, anticipating objection to the long postponement carried by his amendment, modified it to July 1, 1909. As thus modified the amendment was agreed to.[62]

This left the McLaurin substitute, as accepted by Senator Elkins, before the Senate. Senator McLaurin at once withdrew the proposal previously submitted and offered in its place a substitute carrying the effective date of May 1, 1908. This substitute went back to the original form of the Elkins amendment in that it prohibited a common carrier engaged in interstate commerce from engaging in other businesses. It was worded so as to permit carriers to own and operate coal mines within states so long as the products of such mines were not placed in interstate transportation by sale or otherwise.[63]

After somewhat lengthy parliamentary maneuvering and numerous proposals, and finally the withdrawal of the McLaurin substitute,[64] Senator Elkins, at the instance of Senator Aldrich, decided to accept the McLaurin proposal in lieu of his own amendment (that is, the Clapp substitute).[65] He was evidently dissatisfied with the latter which he had accepted but had again and again disclaimed.[66] This proceeding resulted in securing the support of a substantial part of the minority for the Elkins amendment.

The Elkins amendment—that is, the McLaurin substitute, as accepted and reintroduced by Senator Elkins—was then put and agreed to by a vote of 67 to 6, the vote indicating the large Democratic support gained for the original Elkins proposal by the ac-

62 Cong. Rec., 59th Cong., 1st Sess., p. 6552. It is interesting to note that Whereas Elkins disclaimed having accepted the Clapp substitute, this amendment was attached to the latter, although it was referred to continuously as the Elkins Amendment.

63 Do. pp. 6497-6498.

64 Foot notes, 58, 59, supra p. 89.

65 Same as (63), p. 6559-6561.

66 Do. pp. 6456, 6451, 6510.

ceptance of the McLaurin substitute.[67] Prior to the vote on this measure, Senator C. A. Culberson gave expression to the views of a small faction of the minority in a substitute which was defeated by a large vote.[68] Elaborate arguments were also interposed by those concerned as to the effect of the proposed measure on mineral and timber property rights.[69]

After this disposition of the matter Senator Elkins presented an amendment requiring railways to make adequate switching connections where "reasonably practicable" with private side tracks.[70] This provision has some good features but leads to rate complications on joint rates established between private lines affecting junctures with common carriers. We are not, however, concerned with this feature but the enactment is closely connected with the Commodities' Clause in that it requires certain facilities to be provided if a reasonable amount of tonnage can be furnished.

The Commodities' Clause, as agreed to in Committee of the Whole, was taken up in regular order for final passage on May 17th. Senator Tillman introduced a letter from one, D. J. Roberts, a coal operator, designed to show that the amendment as

67 Same as (63), p. 6570. Sen. Jos. Bailey later claimed to be the author of the McLaurin Substitute, Cong. Rec., 61st Cong., 2d Sess., p. 7211 (June 1, 1912).

68 This substitute made it unlawful for any carrier engaged in interstate commerce to engage directly, or indirectly, either as a corporation or through officials or employees, in the production or selling of coal or other commodity; and provided for a penalty of $500 per day for the violation of any provision of the law. It was a more direct and far-reaching measure than the Elkins amendment (Cong. Rec., 59th Cong., 1st Sess., pp. 6563, 6564).

69 Senators Clark and Carter, in behalf of the exclusion of copper and coal (Cong. Rec., 59th Cong., 1st Sess., pp. 6562-6565); and by Senator Fulton and others in behalf of the timber interests (Cong. Rec., 59th Cong., 1st Sess., pp. 6567-6568).

70 The amendment required that "any common carrier subject to the provisions of this act shall promptly, upon application of any shipper tendering interstate traffic for transportation, construct, maintain, and operate upon reasonable terms a switch connection with any private sidetrack which may be constructed to connect with its railroad, where such connection is reasonably practicable, and can be put in with safety and will furnish sufficient business to justify the construction and maintenance of the same; and shall furnish cars for the movement of such traffic to the best of its ability, without discrimination in favor or against any such shipper (Cong. Rec., 59th Cong., 1st Sess., p. 6570).

it stood would not prevent railroads from controlling coal properties by the ownership of stock in such companies; that it would not prevent officials of railways from owning and controlling mining concerns; that it would not prevent ownership of railroads by coal companies, or common ownership and operation of common carriers and mining concerns. A railroad under the law might very well organize a coal company under another name. The latter might lease the land and pay royalty on coal mined and receive preference in allotment of cars. The writer suggested that the amendment should require "railroads to pro-rate cars in proportion to the capacity of the operating coal companies," requiring the car accountant "to keep a separate set of books for coal cars, which shall....be open to....the public," holding railroads responsible for any errors committed by car accountants or other employees.[71] This is the best analysis of the situation that appears and, as will be seen, it accurately anticipates the attitude taken by the courts on the clause as enacted.

In an effort to reach the cases above suggested, Senator Tillman presented an elaborate substitute. It was designed to prevent any interstate carrier from owning the product carried;[72] from having an interest, directly or indirectly, in the production of commodities carried;[73] from buying or selling such commodities;[74] from permitting more than ten per cent of its stock from being owned by those interested in the buying or selling or mining of such articles. This appears to be the most practical amendment presented. It is specific and definite. It does not leave the question of stock ownership in doubt. It was on this point undoubtedly too sweeping to be accepted by the Senate, and it failed of passage.

The same author then proposed to amend the bill by adding, "by partnership, stock ownership, or any arrangement whatsoever." This was likewise defeated. It is very significant that a direct proposal to prevent railroads from owning stock in mining concerns should be voted down; but this was a more radical measure than that immediately preceding, and it was further complicated by the expression "or any arrangement what-

71 Cong. Rec., 59th Cong., 1st Sess., pp. 7011-7012.
72 Do. p. 7012.
73 Do. p. 7012.
74 Do. p. 7014.

soever." Since the provision permitting carriers to own ten per cent stock in mining concerns could not be put through, a less radical, rather than a more radical, proposal should have been made. This action was referred to in the decision of the Supreme Court which denied the claim of the government that stock ownership constituted such an interest as was contemplated in the law.[75]

An urgent effort to limit the application of the law to carriers "whose principal business is that of a common carrier," was unsuccessful.[76] With little objection, however, an amendment to exclude "timber and the manufactured products thereof," was accepted.[77] This modification was permitted on the plea that many lines had been constructed for the specific purpose of hauling timber to connecting points. The same argument of course could be applied to many coal or other mineral roads.

The entire clause, as thus amended, and the order otherwise slightly changed, was now agreed to.[78] As passed by the Senate, the amendment read as follows:

> "From and after May first, nineteen hundred and eight, it shall be unlawful for any common carrier to transport from any state, territory, or district of the United States, or to any foreign country, any article or commodity, other than timber and the manufactured products thereof, manufactured, mined, or produced by it, or under its authority, or which it may own in whole, or in part, or in which it may have any interest direct or indirect except such articles or commodities as may be necessary and intended for its use in the conduct of its business as a common carrier."[79]

VI. Consideration in Conference.

The bill as passed by the Senate now went to the House. All the Senate amendments were promptly disagreed to and a conference ordered.[80] The conference was returned a third time before an agreement could be reached.

75 213 U. S., p. 414.

76 S. H. Piles, 59th Cong., 1st Sess., pp. 7015, 7016, 7017.

77 Cong. Rec., 59th Cong., 1st Sess., pp. 7012, 7015.

78 Do. p. 7017.

79 Paragraph 5, print of May 21, 1906, containing Senate Amendments.

80 Cong. Rec., 59th Cong., 1st Sess., pp. 7187, 7428, 7433. House conferees, Hepburn, Sherman, and Richardson, were appointed to confer with Senate conferees, Tillman, Elkins and Cullom (House, Cong. Rec., 59th Cong., 1st Sess., p. 7433; Senate, pp. 7528-7529).

The House majority would not permit a lengthy discussion on the several conference reports. The Senate discussion, however, was lengthy and was concerned for the most part with the Commodities' and Pass clauses. No other single feature of the bill evoked so much feeling toward the closing days and so many charges of improper influences as the question of separating the business of production from that of consumption.

After the amendment and passage of the bill by the Senate and the first conference report, the discussion centered very largely around the propriety of including pipe lines carrying oil from one state into another, under the provisions of the Commodities' Clause. This was one of the general provisions of the rate bill.[81] Those opposing such inclusion represented themselves in every case as being concerned about the independent producer; so also those favoring such treatment of pipe lines claimed to be representing the independents. It is impossible from evidence contained in the Congressional Record to determine the true attitude of independent oil producers and refiners toward this question.

Senator Tillman submitted a large number of letters from independent refiners urging that pipe lines be required to carry crude oil for hire; declaring that they were forced to sell their crude oil at very low rates to the Standard, and in many cases had to go out of the business. Senator Long presented just as many from independents claiming exactly the opposite. It was charged by Senators and in letters from other independents that the Standard was at the back of practically all those letters and telegrams purporting to represent independents as opposed to including pipe lines in the Commodities' Clause. Evidence at hand, as brought out in the report of the Commission and that of the Department of Commerce and Labor, indicates very strongly that the independents preferred regarding pipe lines as

81 The amendment as accepted by the Senate was as follows: That the provisions of this act shall apply to "Any corporation or any person or persons engaged in the transportation of oil or other commodity, except water, and except natural or artificial gas, by means of pipe lines and partly by railroad, or partly by pipe line and partly water, who shall be considered and held to be common carriers within the meaning and purpose of this act and to ".....any common carrier or carriers, etc. (Paragraph 1, Print of May 21, 1906, containing Senate Amendments; discussion, Cong. Rec., 59th Cong., 1st Sess., pp. 6363-6373; 6998-7009).

common carriers and bringing them under the law.[82] These reports demonstrate conclusively that the monopoly of a large part of the oil business was maintained by the Standard Oil through the ownership of pipe lines.

VII. Final Form of the Commodities' Clause.

Senator Tillman, one of the Senate conferees, was unable to secure the retention of pipe lines under the provisions of the Commodities' Clause. The exclusion was accomplished by changing the words "common carrier" to "railroad," so that the clause, as finally agreed upon in conference and concurred in by the two Houses, read as follows:

> "From and after May first, nineteen hundred and eight, it shall be unlawful for any railroad company to transport from any state, territory, or the District of Columbia, to any other state, territory, or the District of Columbia, or to any foreign country, any article or commodity other than timber and the manufactured products thereof, manufactured, mined or produced by it, or under its authority, or which it may own in whole or in part, or in which it may have an interest, direct or indirect, except such articles or commodities as may be necessary and intended for its use in the conduct of its business as a common carrier."[83]

It may be seen that the clause as finally enacted is somewhat inconsistent with the general provisions of the new law since the latter held pipe lines to be common carriers, and as such, subject to the provisions of the Act.

VIII. Attempts to Postpone the Effectiveness of the Law.

The time approached for the law to go into effect, but none of the roads appeared to have taken steps to bring their operations into harmony with its provisions. No official notice of immunity from penalties had been held out so far as appears from the records. With a single exception, there seems to have been a feeling, however, that the roads would be given an opportunity to adjust their affairs in accord with the statute if the latter

82 R. R. Doc. 814, 59th Cong., 1st Sess. (Report of Commissioner of Corporations); also H. R. Doc. 606, 59th Cong., 1st Sess. (Report of Interstate Commerce Commission on Oil).

83 Final Print of H. R. 12987, Sec. 1, Paragraph 5, 59th Cong., 1st Sess.

should be upheld by the courts. The Attorney General seems to have permitted this view to be held without challenging the correctness of it.

There was also a very decided sentiment among the Commissioners, Congressmen, and others, favoring a postponement of the application of the statute. On March 31st, 1908, Senator Elkins, in behalf of the Committee on Commerce, introduced a joint resolution suspending the effectiveness of the law until May 1st, 1910, that is, so far as the penalty was concerned.[84] He received a request from the Attorney General, however, to so modify the proviso as to confer specific authority upon the Department of Justice to institute civil suit to enforce the law, reserving the right of the parties to the suit to appeal from any decision that might be rendered. This modification to the Committee's resolution was accepted by the Senate.[85]

Much influence was brought to bear to secure the passage of this resolution. The Interstate Commerce Commission urgently recommended it.[86] In a letter of March 12th, in answer to an inquiry from the President, Chairman Knapp stated for the Commission that few railroads had disposed of their mining interests; that the panic from which the country was just beginning to recover had made it extremely difficult to sell such properties advantageously, especially in view of certain technicalities arising with respect to those properties secured many years be-

84 The Committee on Interstate Commerce, in reporting the resolution, changed the effective date in one place from May 1, 1910, to Jan. 1, 1910, thus causing ambiguity by failing to make the change in both places where the date occurred. The resolution as presented by the committee to the Senate read as follows: "Resolved that the failure of any railroad company, prior to May 1, 1910, to comply with that provision of Sec. 1, commonly known as the Commodities' Clause, shall not be held to subject the railroad company so violating said provision prior to Jan. 1, 1910, to the penalties, etc.....now provided by law for violation of said act.....or any act amendatory thereof.....Provided, that nothing in this resolution shall be construed to prevent the bringing of any civil suit or proceeding for the enforcement of said provision or the prevention of violation thereof." (S. Joint Res. 74, 60th Cong., 1st Sess., pp. 41, 43, 48, 95.) The ambiguity in dates was remedied by amendment, Cong. Rec., p. 5537; and the proposal was further amended to limit its application to the Commodities' Clause, Cong. Rec. 9, pp. 5533, 6194.

85 Cong. Rec., 60th Cong., 1st Sess., p. 5538.

86 Do. p. 5533 (Letter appeared in Sen., May 8, 1908; S. Doc. 465).

fore the passage of the law. He believed, therefore, that the time should be extended, but not longer than January 1, 1910.[87]

The opinion of Mr. Glasgow, formerly attorney for the Commission, was doubtless responsible for this attitude on the part of the Commission. Early in March he had informed members of the Commission that it would be very disastrous to many of the railroads of the country if the law should go into effect at the time designated, giving practically the same reasons later given by the Commission in answer to the President's inquiry.[88]

Mr. Glasgow was, at this time, attorney for most of the coal mines in the Pocahontas Flat Top Coal Field in West Virginia. These mines, he stated, were operated under lease from the Pocahontas Coal and Coke Company. The entire capital stock of the coal company was owned by the Norfolk and Western Railway. He maintained that these mines, and a large number of independent mines, were absolutely dependent upon the Norfolk and Western to market their coal, and the enforcement of the law at this time would be so disastrous to the Norfolk and Western as to disrupt it, thus depriving the mines of transportation facilities.[89]

In the Senate, Senator Elkins stated substantially the same reasons in support of his resolution to postpone as were advanced by Mr. Glasgow and repeated by the Commission.[90]

The same resolution was introduced in the House on April 30th, by Representative Hubbard, of West Virginia. It was referred to the Committee on Interstate and Foreign Commerce.[91] For reasons not appearing in the record, the resolution did not come to a vote in either the Senate or the House.[92] No further action was taken for postponement.

87 S. Doc. 465, 60th Cong., 1st Sess.

88 Do.

89 Glasgow favored postponing the effectiveness of the law until May 1, 1910, with the proviso, "if the public interest demanded it, the limit might be further extended to May 1, 1912," S. Doc. 465, p. 5, 60th Cong., 1st Sess.

90 Cong. Rec., 60th Cong., 1st Sess., pp. 5534, 5535.

91 H. Joint Res. 175, 60th Cong., 1st Sess.

92 An unsuccessful effort has been made to ascertain reasons for the refusal to permit this proposal to be voted upon.

CHAPTER IV.

OPERATION OF THE LAW—COURT INTERPRETATION.

I. Extent of Compliance with the Statute.

The Senate passed a resolution on May 6, 1908, calling upon the Commission for information as to whether roads were obeying the Commodities' Clause, specific reference being made to the Western Maryland.[1] It will be remembered that the law went into effect May 1, 1908. The Commission replied that it had no official knowledge, but it did not believe, except in a few cases, that railway corporations had disposed of their properties. The Commission had communicated by 'phone with the Western Maryland officials and understood from the conversation that this railway had not complied with the law, and so informed the Senate.[2]

Several days later, the Commission sent another communication to the Senate, including a letter from B. F. Bush, receiver for the Western Maryland. The letter stated that the Commission was in error in understanding that the Western Maryland was not complying with the law, and proceeded to explain in great detail the conditions forcing the Western Maryland into receivership and the resulting action of the court in setting aside revenues from the coal properties to meet the mortgage indebtedness. The court had, accordingly, placed the properties in the hands of a trust company as security for the mortgage and had ordered that the accounting system of the coal companies be kept separate and apart from that of the railroad.[3] In a letter from the President of the road to the directors, recommending the receivership, it was declared that "the preservation of the coal revenues of the company from the adverse conditions of the commodity clause of the rate bill, was of the utmost importance to the interests of the railway."[4] The receivership was recom-

1 S. Res. 177, 60th Cong., 1st Sess.
2 S. Doc. 465, 60th Cong., 1st Sess.
3 S. Doc. 478, 60th Cong., 1st Sess.
4 Do. p. 3.

mended primarily to evade the effects of the law, "pending a test of the constitutionality of the law,"[5] and it specifically arranged for the return of the properties if the law should be held unconstitutional.

The Bowling Green Trust Company, which had been appointed as trustee, declared as a basis for its application to the courts the necessity of "preserving the integrity" of such of the railroad's properties as were covered by the mortgage. It requested the court to issue an injunction to prevent the railroad from transferring or selling any of the property covered by the mortgage. The receivership was ordered and the receiver authorized "to prosecute or defend in any case pending before any court or commission involving the securities of the corporation."[6] By this action, the Western Maryland effectually shut off immediate proceedings in the court on account of its coal interests.

II. Civil Action of Government in the Circuit Court.

On the refusal of Congress to postpone the effectiveness of the law the Department of Justice brought suit against certain of those carriers that appeared to be violating it. Bills in equity were filed (June 5, 1908) in the Circuit Court for the Eastern District of Pennsylvania to enjoin the so-called anthracite coal roads from carrying in interstate commerce coal produced by them.[7] At the same time petitions for mandamus were filed praying for an order to require these railways to desist from certain practices and comply with the Commodities' Clause.

In the bills in equity and the petitions for mandamus, specific allegations were made regarding the six railway corporations charged with violating the Commodities' Clause. For the most part, these were similar to the facts already presented regarding the several carriers alleged to have other than traffic interests.[8] We shall here present a brief summary of the charges upon which the Government's claim rested.[9]

5 S. Doc. 478, 60th Cong., 1 Sess., p. 5.

6 S. Doc. 465, 60th Cong., 1st Sess., p. 23.

7 The roads against which this action was taken were as follows: The Pennsylvania, the Delaware, Lackawanna and Western, the Central of New Jersey, the Lehigh Valley, the Erie, and the Delaware and Hudson.

8 Chapter II, Sections 3, 4, and 5.

9 Relations charged appear as footnotes 213 U. S. 391-398.

The Pennsylvania,[10] Delaware and Hudson,[11] Erie,[12] Central, of New Jersey,[13] and Lehigh Valley,[14] were alleged to control large mining interests through the ownership of all or a majority of the stock of certain mining corporations. It was declared that these roads controlled the election of all the directors and managers in such mining companies; that the officials were also officers in the said railway companies respectively; that all the mines (see footnotes 10, 11, 12, 13, 14, appended) were producing anthracite coal which was carried for sale and delivery by the said railways into interstate commerce; that the railways were therefore virtually miners and carriers and sellers of coal in interstate commerce; and that such mining and selling constituted such an interest, "direct or indirect," in mining operations as the Commodities' Clause was designed to prohibit; and that the carriers were therefore operating in violation of the law. The Government brought special charges against the Delaware, Lackawanna and Western,[15] and the Delaware and Hudson[16] on account of the alleged direct holding and operation of certain coal mines in violation of the Commodities' Statute.

In answer, the railroads replied, that the property interests involved and the acts growing out of such acquisitions had been properly authorized through state charters granted prior to 1869 and later; that the ownership of stock or other relationships charged were not equivalent to owning coal lands or mines, but that the titles remained in the companies respectively in their corporate capacity; that the interests resulting did not therefore constitute such a legal interest, "direct or indirect," as the statute was designed to prevent. The defendants frankly admitted that officers and directors of railways frequently held or

10 Summit Branch Mining Co., Susquehanna Coal Co., Mineral R. R. and Mining Co.

11 Hudson Coal Co., Northern Coal and Iron Co., and the Jackson Coal Co.

12 Pennsylvania Coal Co., Hillside Coal and Iron Co.

13 Lehigh and Wilkes-Barre Coal Co.

14 New York & Middle Coal Field R. R. and Coal Co. of Pennsylvania; Coxe Bros. & Co., Locust Mountain Coal and Iron Co., minority interest in Highland Coal Co., and the Packer Coal Co.

15 About 15,000 acres owned directly in Wyoming and Lackawanna Valleys.

16 Holdings in counties of Luzerne, Lackawanna, Susquehanna and Wayne.

had held official positions in mining companies whose stock was the property of the railway in question. Chief reliance, however, was placed upon the plea that the statute was unconstitutional in that, (1) it was a prohibition, and not a regulation, of commerce; (2) that it took property without due process of law and was contrary to the Fifth Amendment; (3) that it was a case of class legislation in that it excluded timber and its products; and (4) that the penalty for violation was so heavy as to destroy property and franchises which had been created through many years under the law. The Delaware and Hudson presented the additional argument that even if it were primarily a railway subject to the interstate commerce law, it could not be affected by the statute in question because all its coal was sold before transportation began.[17]

The Circuit Court dismissed the bills in equity and denied the petitions for mandamus. In taking this action the court held, first, that the clause was unconstitutional and in violation of the Fifth Amendment; secondly, that it does not come properly within the commerce clause of the constitution since it absolutely excludes certain parties from participating in interstate commerce, and to this extent surpasses the power of Congress to regulate; thirdly, that many railways acting under state authority had become owners and operators of coal properties, and that the Commodities' Clause interfered with the vested rights so established; and fourthly, that the power granted under the commerce clause of the Constitution is a limited power and does not extend to policing the state.[18]

The problem of vested rights seems to have been at the bottom of the decision of the Circuit Court. The leading query set up for answer was as to the constitutionality of the clause *in view of its destructive effect upon property-rights under state laws.* Little attention was given to the power of Congress to enact such a statute as a regulation of commerce; at least it made the *constitutionality* of such action rest *almost entirely upon the interference of the law enacted with certain property rights existent at the time of the passage of the law.*

The opinion was dissented from by Judge Buffington on the ground "that the divorce of the dual relation of public carrier

17 213 U. S. 393.
18 164 Fed. Rep., 215-251.

and private transporter is a regulation of commerce," and therefore within the power of Congress to enact.[19] The dissenting opinion put aside the court's view of the prior act of a state in authorizing carriers to engage in certain other activities as restricting the power of Congress to regulate such carriers in so far as they entered into interstate commerce. "In effect," said Judge Buffington, "it would place in each state a veto on the power to regulate conferred on the United States."[20]

III. The Commodities' Clause Before the Supreme Court.

From the judgment of the Circuit Court in dismissing the bill in each of the six cases, the Government appealed to the Supreme Court, assigning certain errors in each case.[21] The six cases were argued together before the Supreme Court on January 19-20, 1909. The following facts were recognized by the counsel for both sides: (1) That certain of the railways owned mines outright, operated them and transported the product in interstate commerce; (2) that others owned, as well as leased, coal mines; and (3) that others owned stock in coal mines, but did not operate them directly. As in the other cases, however, the carrier owning the stock controlled the transportation and sale of the product.[22]

Perhaps the Government contended for a more radical interpretation of the law than the apparent intent of Congress justified. It not only insisted that the transportation in interstate commerce of coal produced directly or by authority of the railway in question was in violation of the law, but also that the law forbade any interstate carrier to transport in interstate commerce a commodity produced by a concern in which the railroad held stock *without any regard to the extent of such holdings.*[23] The

19 164 Fed. Rep., 251-259.

20 Do. 252.

21 Transcript of Record (Print): S. C. of the U. S., Oct. Term, 1908; re Penn. R. B. No. 563, pp. 18-19, and No. 569, pp. 15-16; re Del. & Hudson, No. 559, pp. 74-75, and 565, pp. 70-71; re Erie Railroad, No. 560, pp. 204-205 and 566, p. 200; re Central of New Jersey, No. 561, pp. 84-85 and 567, pp. 80-81; Delaware and Lackawanna and Western, No. 562, pp. 74-75 and 568, pp. 24-25; re Lehigh Valley, No. 564, pp. 94-95, and 570, pp. 89-90.

22 213 U. S., 392-399.

23 Do. 406.

Government therefore contended that all such coal properties or stock in coal companies should be disposed of.

The Supreme Court put aside the claim that one road (the Delaware and Hudson) was primarily a coal company.[24] It also put aside the leading contention of the lower court as to "interference" with "vested" rights, maintaining that the power of Congress to regulate commerce is "ever enduring" and that this power "must remain free from restrictions and limitations arising or asserted to arise by state laws," since any other construction would subject federal acts of regulation to the veto of the states. The Supreme Court also conceded that the requirement of dissociation might very properly be regarded as an act of regulation,[25] but that such an issue did not seem to be presented by the cases in hand. It declared, however, that the construction demanded by the Government would necessitate the consideration of the following "grave" constitutional questions:

> "(1) Whether the power of Congress to regulate commerce embraces the authority to control or prohibit the mining, manufacturing, production or ownership of an article or commodity, not because of some inherent quality of the commodity, but simply because it may become the subject of interstate commerce. (2) If the right to regulate commerce does not thus extend, can it be impliedly made to embrace subjects which it does not control, by forbidding a railroad company engaged in interstate commerce from carrying lawful articles or commodities, because at some time it had manufactured, mined, produced, or owned them?"

It may properly be inquired in this connection as to whether the power to regulate embraces the authority to prohibit such antecedent mining, manufacturing, production or ownership of an article or commodity *"simply because it may become the subject of interstate commerce,"* or because such manufacturing, producing, etc., *in conjunction with the function of interstate transportation,* tends to the creation of a monopoly of a commodity or commodities entering into interstate commerce. The answer to this inquiry seems clearly implied in the words of the court, "the power to regulate commerce possessed by Congress is in the nature of things ever enduring, and therefore the right

24 213 U. S. 392-399, 418.
25 Do. 405-406.

to exert it to-day, to-morrow and at all times in its plenitude must remain free from restrictions and limitations arising or asserted to arise by state laws, whether enacted before or after Congress has chosen to exert and apply its lawful power to regulate."[26]

The second inquiry involving the constitutionality of the Government's claim assumes an answer to the first in the negative although the court conceded for the purpose of this discussion "that the power of Congress to regulate commerce can be constitutionally so exerted as to compel a railroad company engaged in interstate commerce to dissociate itself in interest from the commodities which it transports in interstate commerce, even although by existing state laws the railroad company may have a lawful right of ownership or association with the commodity which the regulation affects.[27]

The Supreme Court decided to waive consideration of these questions and confine its attention to such a reconciliation of the several features of the statute as would not necessitate passing upon those constitutional phases involved in the Government's contention. It then turned its attention to the two separate classes of prohibitions: (1) the transportation of a commodity which the carrier has produced or which has been produced under its authority; and (2) the transportation of a commodity which the carrier owns in whole or in part, or in which it has an interest, direct or indirect. The first class of prohibitions, if accepted as the meaning of the law, would prevent carriage whether the article in question is owned or not at time of carriage; whereas the second class would prevent carriage if the article in question is owned by the carrier or possesses interest for the carrier. The court in proceeding deduced the "less radical of the two prohibitions" as attaining the result intended by Congress.

Let us look more closely into this method of interpretation. The first and second prohibitions forbid a railroad to transport in interstate commerce "any article or commodity, other than timber....manufactured, mined, or produced by it, or under its authority" without regard to its ownership at the time they are presented for carriage; and the second, forbids such railroad from transporting any commodity which it "may own in whole

26 213 U. S. 404.
27 Do.

or in part, or in which it may have an interest, direct or indirect" without regard to the origin of such commodity prior to its presentation for carriage.

The court very properly declared that the first two

> "are, if literally construed, not confined to the time when a carrier transports the commodities with which the prohibitions are concerned, and hence the prohibitions attach and operate upon the right to transport the commodity because of the antecedent acts of manufacture, mining, or production. Certain also is it," said the court, "that the two prohibitions concerning ownership, in whole or in part and interest, direct or indirect, speak in the present and not in the past; that is, they refer to the time of the transportation of the commodities. These last prohibitions, therefore, differing from the first two, do not control the commodities if at the time of the transportation they are not owned in whole or in part by the transporting carrier, or if it then has no interest, direct or indirect, in them."[28]

The court follows this very accurate exposition of the statute with an argument to prove that the provisions are self-annihilative:

> "If the first two classes....be given their literal meaning, and therefore be held to prohibit, irrespective of the relation of the carrier to the commodity at the time of transportation, and a literal interpretation be applied to the remaining propositions....thus causing them only to apply if such ownership and interest exist at the time of transportation, the result would be to give the statute a self-annihilative meaning."[29]

The court declares that the situation presents a dilemma, (1) in prohibiting the carriage of commodities manufactured, mined, or produced by the carrier, and (2) permitting the carriage if the commodities presented were sold by the carrier, before their actual receipt for transportation: "The consequence, therefore, would be that the statute, because of an immaterial distinction between the sources from which ownership arose, would prohibit transportation in one case and would permit it in another like case."

The construction of the statute giving rise to this interpreta-

28 213 U. S. 408, 409.
29 Do. 409, 410.

tion was strongly defended in the Senate by those who were responsible for drafting it. It was maintained that the two sets of prohibitions were not contradictory since the statute did not commission the carrier to do one thing that it forbade in another part of the same instrument. Senator Bailey declared that the so-called defect "was nothing more than a failure to include a certain class of cases within the prohibitions of the statute," and that such cases were not included because it was not the custom of railways to enter into the open market and buy coal and then sell it prior to receiving it for transportation.[30]

The explanation given by Senate leaders appears very reasonable since the problem of the railway monopoly of the coal trade has been threatened, not through the purchase and sale of coal by railways prior to the act of transportation, but through the joining of the functions of producer, transporter and seller under a single directive policy. As already shown, by far the larger part of coal tonnage in the anthracite fields accrues, not from such coal as is bought and sold prior to the act of transportation, but from mines in which the carrier has an interest. For this reason it is difficult to understand why the court selected that portion of the clause which might be interpreted to apply only to exceptional cases in preference to that portion covering those customary practices and relationships which were held to be so reprehensible and which it was the spirit of the law to prohibit.

When the court had settled upon the so-called latter prohibitions of the clause as expressing the real intent of Congress it proceeded to interpret the meaning of the key words "any interest, direct or indirect."

> "The contention of the Government," said the court, "that the clause forbids a railroad company to transport any commodity manufactured, mined or produced, or owned in whole or in part, etc., by a bona fide corporation in which the transporting carrier holds a stock interest, however small, is based upon the assumption that such prohibition is embraced in the words we are considering. The opposing contention, however, is that interest, direct or indirect, includes only commodities in which a carrier has a legal interest, and therefore does not exclude the right to carry commodities which have

30 61st Cong., 2d Sess., pp. 7211-7218. In our discussion of this point we acknowledge our indebtedness to the able argument made in the Senate in defense of the wording of the clause.

been manufactured, mined, produced, or owned by a separate and distinct corporation, simply because the transporting carrier may be interested in the producing, etc., corporation as an owner of stock therein. If the words in question," reasoned the court, "are to be taken as embracing only a legal or equitable interest in the commodities to which they refer they can not be held to include commodities manufactured, mined, produced, or owned, etc., by a distinct corporation merely because of a stock ownership of the carrier. ....The contention of the government substantially rests upon the assumption that unless the words 'directly or indirectly' be given the meaning contended for, they are without significance."[31] The Supreme Court concluded, therefore, "It may well be that the very object of the provision was to reach and render impossible the successful employment of methods of the character referred to," but that they were constrained to conclude that such was not the case in view of the action of the Senate, where the amendment originated, in rejecting specific proposals that the clause embrace stock ownership, and likewise an amendment "declaring that interest, direct or indirect, was intended.... to embrace the prohibition of carrying a commodity manufactured, mined, produced, or owned by a corporation in which a railroad company was interested as a stockholder."[32]

The court did not consider that an interest expressed by stock ownership constituted such a legal interest as was intended to be prohibited by words "any interest, direct or indirect," thus practically invalidating that portion of the clause selected as representing the true intent of Congress.

The Attorney General suggested that the "radical effect of the law could be assuaged by limiting its prohibitions so as to cause them to apply only so long as the commodities are in the hands of the carrier or its first vendee." The court replied, however, that "no such limitation is expressed in the statute and to engraft it would be an act of pure judicial legislation."[33]

Notwithstanding the court's rejection of a proposal limiting the prohibitions of the statute to the carrier and first vendee, the purport of the final interpretation was to modify the effect of the statute still further than counsel suggested, by applying the pro-

31 213 U. S. 413.
32 59th Cong., 1st Sess., pp. 7012-7014; 213 U. S. 413, 414.
33 213 U. S. 406.

hibitions only to such commodities as are owned by the carrier at the time of carriage. This is clearly brought out in the court's final interpretation of the entire statute. In summing up, the court said:

> "We then construe the statute as prohibiting a railroad company engaged in interstate commerce from carrying articles or commodities under the following circumstances and conditions: (a) when the article or commodity has been manufactured, mined, or produced by a carrier or under its authority, and at the time of transportation the carrier has not, in good faith before the act of transportation, dissociated itself from such article or commodity; (b) When the carrier owns the article or commodity to be transported in whole or in part; (c) When the carrier at the time of transportation has an interest, direct or indirect in a legal or equitable sense in the article or commodity, not including therefore, articles or commodities manufactured, mined, produced or owned, etc., by a *bona fide* corporation in which the railroad is a stockholder."[34]

As thus construed the statute was held to be constitutional. It may readily be seen that this interpretation goes beyond the limitation of the prohibitions of the law to the carrier and its first vendee as suggested by the Attorney General in that such prohibitions are held to apply only to the carrier's actual ownership of commodities in process of transportation. The Supreme Court accordingly reversed the decree of the Circuit Court and remanded the case for further proceedings in accord with its interpretation.[35]

Justice Harlan, in a brief dissenting opinion declared that the Act included in its prohibitions

> "a railroad company transporting coal, if, at the time, it is the owner, legally or equitably, of stock—certainly, if it owns a majority or all the stock—in the company which mined, manufactured, or produced, and then owns, the coal which is being transported by such railroad company. Any other view of the act will enable the transporting company, by one device or another, to defeat altogether the purpose which was to divorce, in a real substantial sense, production and transportation, and thereby to prevent the transporting company from doing injustice to other owners of coal."[36]

34 213 U. S. 415, 416.
35 Do. 418.
36 Do. 419.

It may very readily be seen that the dissenting opinion approached the application of the statute from a different angle. The majority opinion was based upon the assumption that the mining corporations *were in fact bona fide* and that therefore stock owned in such corporations by railways would not constitute such a legal or equitable interest as the law was designed to prohibit; thus leaving the question entirely open as to whether the relationships precedent to and resulting from such holdings warranted the conclusion that the mining corporations were or were not bona fide.

The dissenting opinion attempted to go behind the whole relationship by declaring that the law was intended to apply where the railroad was the owner, "legally or equitably, of stock—certainly, if it owns a majority of all the stock—in the company which mined, manufactured, or produced, and then owns, the coal which is being transported by such railway company."

In the light of the refusal of the Senate specifically to forbid railways from owning mining stock, the contention of the Government that the Act should be construed to cover such holdings, irrespective of their extent, was doubtless not fully justified. A more moderate charge alleging that, in specific cases, stock holdings established relationships which were covered by the prohibitive measures of the statute, might have brought better results. It is clear, at any rate, that the mere prohibition of stock ownership, irrespective of extent, should not have been set up as fundamental to the effectiveness of the law and as the groundwork for building up the Government's case.

A careful reading of the debates in Congress leads us to believe that the central object of the legislation was to separate the business of transportation from industrial interests inimical to the proper performance of duty as a common carrier. This view is brought out clearly in the reports of Senators Tillman, Newlands, and Elkins, in submitting the bill to the Senate; and it was brought out again and again in the debates.[87] It was clearly assumed in the consideration of resolutions looking to a postponement of the effective date of the law.[88] At this time the Commission, the Attorney General, with the apparent approval

37 Supra pp. 80-95.

38 Cong. Rec., 59th Cong., 1st Sess., pp. 7012-7014; also 60th Cong., 2d Sess., pp. 7211-7218.

of the President, and the active support of leading authorities, urged upon Congress the passage of such a measure.[39] A leading organ of the financial interests had stated, "its object and purpose was to force the coal carriers, both anthracite and bituminous, to dispose of their holdings in connection with the coal mining business;[40] and again, the statute was designed "to make it impossible for a company to engage at the same time in the carrying and mining of coal."[41] The lower court held similar views, saying "the legislative will could not be expressed more unequivocally. There is no room for doubt as to the meaning and practical effect of the clause in question."[42]

The construction given permits the carriage of an article where a *bona fide* sale has taken place prior to the act of carriage, that is, barring the consideration regarding valuable concessions resulting from the peculiar position of the carrier as a party to a sale of a product owned by it—a consideration not entering into this decision. Accepting the construction of the court, the sale of the commodity in question before transportation began, might reasonably be held to constitute interest if the purchaser was given any inducement whatsoever arising from the peculiar association of the carrier with the commodity at the time of purchase, or with the act of transportation to follow.

As will appear, so far as the immediate effect of the court's interpretation was concerned, the anthracite roads experienced little difficulty in adjusting their relation to the coal business, so as technically to avoid a violation of the statute. It must not be forgotten, however, that the relationship acceped by the court as permissible under the statute was such as the railroad might sustain toward "*bona fide* manufacturing, mining or producing corporations";[43] although the court did not attempt to construe the expression *bona fide* beyond the construction given in former cases[44] and that implied in accepting the construction of the railways that "interest, direct or indirect," includes only commodities in which a carrier has a legal interest, and therefore does not exclude the right to carry commodities which have been man-

39 60th Cong., 1st Sess., S. Doc. 406; also supra p.
40 Commercial and Financial Chronicle, Sept. 12, 1908.
41 Do. July 14, 1906.
42 164 Fed. 215.
43 213 U. S. 413.
44 Pullman Palace Car Co. vs. Mo. Pac. R. R., 115 U. S. 587.

ufactured, mined, produced, or owned by a separate and distinct corporation, simply because the transporting carrier may be interested in the producing, manufacturing or mining corporation as an owner of stock therein; and again that "a legal or equitable interest....can not be held to" have reference to "commodities manufactured, mined, produced or owned....by a distinct corporation merely because of a stock ownership of the carrier."[45] Throughout the entire decision of the Supreme Court it is clearly assumed that the interest permitted is bona fide and that it is such a legal or equitable interest which one corporation as a distinct entity may properly maintain in another corporation, unless such holdings should be specifically forbidden by Act of Congress.

It is difficult, however, to draw any valuable inference from this assumption since it appears in the face of evidence showing very conclusively that the relation assumed to be bona fide amounted to a virtual merging of railway and coal-mining interests under a single controlling power. Perhaps we may fairly conclude that the Court, realizing the far reaching effect of a rigid interpretation of the statute, proposed to leave this question open for a more definite development and expression of public opinion.

The decision may not be held, however, as without consequence in the regulation of relationships between railways and industrial concerns. A very distinct advance was made by the declaration that Congress had the power to prohibit an interstate carrier from transporting in interstate commerce an article which it owned at the time of receipt for carriage or in the course of carriage.[46] Such a conclusion may be far reaching in its effect upon further legislation. If Congress may prohibit carriage under such conditions, why may it not also prohibit carriage if the commodity presented has been manufactured, mined or produced by such carrier? Refusal to permit ownership during carriage when such ownership appeared in the eyes of Congress prejudicial to the proper performance of the carrier's duty toward all shippers or as tending to monopolize the commodity involved would seem to imply power to prohibit ownership previous to the act of carriage when such ownership appeared likewise prejudicial.

45 213 U. S. 413, 414.
46 Do. 404.

The government may, therefore, be said to have failed to secure the immediate and fundamental readjustment of the relation between railways and the coal industry for which it contended, but to have succeeded in establishing the power of Congress to dissociate ownership of traffic from the act of transportation, and to have reserved for further adjudication the legality of these stockholdings and other relationships which amounted to a virtual control of the operation of the coal companies by the railroads so holding.

Furthermore, as has been indicated, the court left the question entirely open for further adjudication as to whether the relation sustained by railways to coal companies through stock ownership was in fact bona fide. The Court forebore expressing any opinion as to the legitimacy of this relationship, simply remanding to the Circuit Court without "particular directions" beyond an order "for such further proceedings as may be necessary to apply and enforce the statute as we have interpreted it."[47]

IV. Adjudication in the Circuit Court.

In the light of the construction of the Act as above set forth, the Government filed an amended bill in the Circuit Court of the Eastern District of Pennsylvania charging that all the stock of the Lehigh Valley Coal Company was not only owned by the railroad, but that the latter "used the power thus resulting from its stock ownership so as to deprive the coal company of all real independent existence and to make it virtually but an agency or dependency or department of the railroad company," the coal company being used by the railroad "as a mere device to enable the railroad company to violate the provisions of the Commodities' Clause." The Government charged, therefore, that the coal company was not in fact a bona fide mining company, but "merely an adjunct or instrumentality of the defendant;" that "the production, shipment, and sale of all the coal within the territory served by the railroad was brought within the dominion of that company practically to the same extent as if it were the absolute owner of the same."

On objection by the railway, the court denied the request of the government to file an amended bill.[48] The Supreme Court in

47 213 U. S., 419, 420.
48 220 U. S., 268, 269.

reviewing this decision declared that the refusal of the court below to permit the filing of such a bill was "an absolute abuse of discretion."[49] It declared that the facts on the amended bill

> "tended to show an actual control by the railroad company over the property of the coal company and an actual interest in such property beyond the mere interest which the railroad company would have had as a holder of stock in the coal company. It must be held that, while the right of a railroad company as a stockholder to use its stock-ownership for the purpose of a bona fide separate administration of the affairs of a corporation, in which it has a stock interest, may not be denied, the use of such stock-ownership in substance for the purpose of destroying the entity of a producing, etc., corporation and of commingling its affairs in administration with the affairs of a railroad company so as to make the two corporations virtually one, bring the railroad company so voluntarily acting.... within the prohibitions of the Commodities' Clause."[50]

The Supreme Court decided, therefore, that error was committed in denying leave to file the amended bill, reversed the decree of the lower court, and remanded the cause with directions for further proceedings in conformity with its ruling.[51] Before the case came up, however, the Lehigh Valley Coal Sales Company was formed and, in view of this new feature, the Department of Justice obtained a decree dismissing the petition without prejudice so that a new petition, taking cognizance of the existence of the Sales Company, might be prepared.[52] This was accordingly done and a decision has been rendered.[53]

V. Application of the Sherman Anti-Trust Law to the Anthracite Combines.

In 1907 the Department of Justice filed suit in the Circuit Court for the Eastern District of Pennsylvania against the six

49 220 U. S. 271.

50 Do. 274.

51 Do. 273, 274. The court at the same time affirmed the dismissal by the circuit court of cases against the Erie, the Central, the Pennsylvania, and the Delaware and Hudson, notwithstanding the fact that the intercorporate relations of some of these roads rendered them proper subjects for further proceedings as in the Lehigh case. The court refused to dismiss these cases "without prejudice" as requested by the Attorney General.

52 Decree of District Court of U. S., E. D. of Penna., U. S. vs. Lehigh Valley R. R. Co., No. 97 in Equity, filed Jan. 27, 1913.

53 Chapter IV, Section 7, Sub-section 3.

anthracite roads, alleging a conspiracy to control the output, transportation, and sale of anthracite coal. The government charged; (1) the existence of a general combination for the purpose of controlling the transportation and sale of anthracite coal in violation of the Sherman Anti-Trust Law; and (2) Specific combinations within the general combination, also violative of this statute.[54] The government further alleged that the railways were then carrying 77 per cent of all hard coal deposits; that they themselves produced 60 per cent and actually marketed, 70 per cent, of the entire annual output. The so-called 65 per cent contracts, which we have considered,[55] and which were made effective through the medium of the Temple Iron Company,[56] were objected to by the government as a part of the general plot to restrain trade and eliminate possible competition.

The government lost in the lower court on all the charges except that regarding the Temple Iron Company.[57] This corporation was declared to be in violation of the Sherman Anti-trust Law.

The case was at once appealed to the Supreme Court of the United States and a decision has recently been rendered.[58] Justice Lurton, in delivering the opinion of the court, said, "Aside from the particular transactions averred as 'steps' or 'acts in furtherance' of a pre-supposed general combination, the charge of such a combination is general and indefinite. The case is barren of documentary evidence of solidarity;" if the conditions charged, exist, they must be "deduced from specific acts" characterizing the relations of companies. In this respect the court concurred with the lower court in finding "no contract or agreement" amounting actually to the apportionment of tonnage.

With regard to the Temple Iron Company, the court accepted the facts as they have been above outlined[59] and concurred in the decision of the lower court declaring such company to be in viola-

54 We are passing over the specific averments against the Reading and Erie respectively as to separate railway combinations as these averments were put aside by the court as outside of the government's allegation of a general combination.

55 Chapter II, Sub-section 6.

56 Chapter II, Sub-section 6, and footnote on Temple Iron Co.

57 Justice Buffington dissented in construing the 65 per cent contracts.

58 The U. S. vs. The Reading Company, a Holding Co., et al. (not yet reported).

59 Supra pp. 44 (and foot note 72).

tion of the law.[60] The court said, "If the carriers did, as we have found to be the fact, combine to restrict the freedom of interstate commerce either in the transportation or the sale of anthracite coal in the markets of other states, and adopted as a means for that purpose the Temple Iron Company, and through it, the control of the great Simpson and Watkins' collieries, the parts of the general scheme, however lawful considered alone, become parts of an illegal combination under the Federal Statute which it is the duty of the court to dissolve, irrespective of how the legal title to the shares is held."[61]

Much emphasis was given to the throttling of an independent line by the creation of the Temple Iron Company, the court recognizing in the latter a power effective enough to throttle any similar attempt that might be made. "Its board of directors," said the court, "composed as it is of men representing the defendants, supplies time, place, and occasion for the expression of plans or combinations requiring or inviting concert of action."[62]

In considering the 65 per cent contracts, the court declared that, "considered singly" they might be "wholly innocent.... But a series of such contracts, if the result of a concerted plan or plot between the defendants to secure the control of the sale of the independent coal in the markets of other states, and thereby suppress competition in prices between their own output and that of the independent operators, would come plainly within the terms of the statute, and as parts of the scheme or plot would be unlawful."[63] In this respect the higher court's interpretation concurred with that of the dissenting Judge Buffington, in the circuit court, who recognized such contracts as effectually controlling the situation at that time and at all future times, so long as they could be maintained.[64]

The Supreme Court then put aside all consideration of the "minor combinations" as not involved, and as not properly to be considered together with the charge of a general combination. These so-called "minor combinations" that were alleged to be involved in the general plan for the control of the coal trade had

60 U. S. vs. The Reading Co., a Holding Co., et al. (not yet reported).

61 Do. p. 12.

62 Do. p. 12.

63 U. S. vs. Defendant Railways, Docket Nos. 198, 206, 217 (combined decisions), p. 23.

64 Do. p. 23.

to do, (1) with the purchase in 1898 of the capital stock of the New York, Susquehanna and Western Railroad by the Erie; (2) in 1899 of the Pennsylvania Coal Company, the Erie and Spring Valley Coal Company, and the Delaware and Kingston Railroad Company, by the Erie Railroad; (3) the acquisition in 1901 of a majority stock interest in the Central Railroad of New Jersey by the Philadelphia and Reading Company, a holding company; and (4) the purchase and sale agreements between the Elk Hill Coal and Iron Company and the Pennsylvania Coal Company. No opinion was expressed as to the legality of these combinations, the court simply directing that the bill, in so far as it sought relief against the minor combinations, be dismissed without prejudice.

The District Court, in conformity with the decision of the Supreme Court, entered a decree dissolving the Temple Iron Company and enjoining the anthracite roads, with several exceptions dismissed without prejudice for further litigation,[65] from further operations under the so-called 65 per cent contracts.[66] The so-called minor combinations according to the higher court's instructions were dismissed without prejudice. The Department of Justice is now preparing special bills for further injunctions in some, or all, of these cases.

It is too early to say what effect the decree of the Court dissolving the Temple Iron Company and enjoining operations under the 65 per cent contracts, will have upon railway domination of the anthracite fields. The decree does not forbid individual roads from entering into such contracts; on the other hand it is declared in the decision of the higher court that "considered singly" the contracts may be "wholly innocent." It is only the "series of such contracts, if the result of a concerted plan or plot between the defendants," etc., to which objection is made. It remains to be seen whether the community of interests established by the creation and successful operation of the Temple Iron Company and the recognition of the efficacy of the 65 per cent contracts, have not made such an impression upon

65 Re agreements between the Penn. Coal Co., and the Elk Hill Coal Co.; the New York, Susquehanna Western Coal Co., and John and Joseph Jermyn; the Hillside Coal and Iron Co., and the Lackawanna Coal Co.; and the D. L. & W. R. R., and the People's and George F. Lee Coal Companies.

66 Decree entered in District Court of Eastern Penna., May 26, 1913.

the interests involved as to enable them to accomplish, through informal understandings and individual contracts and agreements to the extent to which they are permissible, as much as they have hitherto accomplished through the instrumentality of the Temple Iron Company and the uniform contracts.

So far as outward expressions may indicate, the decision did not seriously disturb the anthracite coal roads. There was an immediate advance in stock.[67] The President of the Reading Co. said, on being advised of the decision, "I have always been indifferent as to the 65 per cent contracts. They were made with the operators to induce them to join in the settlement of the strike of 1902." Other operators expressed similar views. The Attorney General, however, declared that the decision would "so completely destroy the combination which now controls the price of our coal that it must result in a distinct measure of relief to the public."[68]

VI. Effect of Decision Upon Railway and Coal Mining Relationships.

After the general decision of the Supreme Court interpreting the Commodities' Clause, some of the roads immediately took steps to adjust their relationship with coal mines so as to avoid a violation of the statute as construed. The plan almost uniformly adopted involved the creation of so-called sales companies whose function should be the purchase of coal from the railways creating them prior to offering the same for transportation and sale.

The Delaware, Lackawanna and Western was the first to effect a sales corporation.[69] The manner of organization is well set forth in a statement sent to all stockholders as follows: "In conformance with the decision recently rendered, declaring that this company can not lawfully transport in interstate commerce coal owned by it, a coal-selling company has been organized under the laws of the State of New Jersey, under the name of the Dela-

67 On day of decision, Reading stock sold nearly ten points higher; Lackawanna twenty-six; Central, ten; Lehigh Valley, four and one-half; others also advanced Journal of Commerce & Commercial Bulletin, Dec. 18, 1912.

68 World's Work, December 28, 1912.

69 Plan explained in Annual Report D. L. & W. 1909, also quoted in government's brief, pp. 12-14.

ware, Lackawanna and Western Coal Company, the capital stock of which will be $6,800,000.00, divided into 136,000 shares of $50.00 each par value."[70] It was further provided that the railway, "as seller, shall contract with said coal company, as the buyer, to sell and deliver the coal mined and purchased by the railroad company to the coal company at the mines."

In order to apportion the capital stock of the coal company among stockholders of the railway it was provided that the latter might subscribe for one share of the mining stock for each four shares of railway stock then held. As a part of the plan the company declared a fifty per cent dividend on capital stock, one-half of which was exchangeable for an equivalent proportion of stock in the new coal company, the other half being paid in cash. With an insignificant exception,[71] all the railway stockholders availed themselves of this offer.

Notwithstanding the creation of a separate corporation, the same financial interests remained in control of the railway and the coal company. William H. Truesdale and Edward E. Loomis, President and Vice-President respectively of the railroad, were appointed to two of the seven directorships. Mr. Loomis became President of the new company.

As a further means of insuring continuous and harmonious relations, a contract was entered into with the following specifications:

> "That the railroad company would sell to the coal company all mined, marketable coal then owned, except such as it should elect to retain for use in its business as a common carrier, to be paid within thirty days at prices designated; that the railroad company would lease to the coal company certain storage and stocking plants, trestles, and docks, and accept in payment 5 per cent per annum on a valuation to be agreed upon; that the coal company would take over the sales' agency contracts theretofore made by the railroad company; that the railroad company would sell and deliver to the coal company f. o. b. cars at the breakers, all coal purchased by it, the amount to be so sold and delivered to be *at the absolute option of the seller* and without liability upon its part for failure to supply. The coal company, however, agreed to purchase all coal offered by the railroad company, and

70 July 1, 1909.

71 Only about $30,000 of stock was not so exchanged.

no other, unless necessary to comply with contracts then outstanding."[72]

It was further agreed that the coal company would "purchase from the railroad company all coal delivered on cars at the breakers, and pay for all sizes above pea 65 per cent of the general average f. o. b. prices at tide points at or near New York between Perth Amboy and Edgewater, and for the smaller sizes specified portions of such general average prices; that the coal company would conduct the *business of selling so as best to conserve the interest of and preserve the good will and markets of the coal mined by the railroad company;* that any disputes which might arise between the parties should be settled through a board of arbitration, made up as specified; and that the terms of the agreement itself might also be modified by arbitration if conditions justified;"[72] that the contract should continue to be operative until six months after either party shall notify the other in writing of its intention to cancel the same, and that upon its expiration the coal company would sell to the railroad company and the latter would buy all coal then stored or in transit, the price to be agreed upon or fixed by arbitration.[73]

It may readily be seen that such an agreement preserves the railway's control of all properties formerly controlled. It is significant (1) that the coal company is always required to buy all coal offered by the railroad but the sale and delivery are to be at the absolute option of the latter; (2) that the coal company may buy no other coal unless it is necessary to fill outstanding contracts that can not be met by supplies available; (3) that the sixty-five per cent contracts, the operation of which we have described, should govern all shipments of coal; (4) that a continuation of the contract is at the option of the railway; and (5) that the business of the coal company should be conducted so as best to conserve the interest of and preserve the good will and the markets hitherto enjoyed by the railway. What more effectual plan could be conceived for preserving intact the railways interest in the mining industry!

The remaining anthracite roads, with the exception of the

72 Italics do not appear in original.

73 Exhibit A to original petition in Circuit Court, appearing in government's brief in appeal to the Supreme Court, and as an appendix to brief (in full pp. 25-34), Trans. of S. C. Rec., Oct. Term, 1910, The U. S. vs. D. L. & W., and D. L. & W. Coal Co.

Reading have followed this general plan of organization. The plan as adopted by the Lehigh Valley, in the creation of the Lehigh Valley Coal Sales Company, is practically identical.[74] The Delaware and Hudson employed its subsidiary, The Hudson Coal Company, for this purpose, simply stating in its annual report that on and after June 1, 1909, all coal produced by that railway was sold to the coal Company.[75] The railway company, however, always gives space to the "Coal Mining Department" in subsequent Railway reports. The Central of New Jersey and the Erie are operating through their own coal companies, although the plan of operation is not fully disclosed. It is understood, however, to be similar to that employed by the Delaware and Hudson.

The situation confronting the Reading Company is most intricate. This company is a holding company for the stock of the Reading Railway and the Reading Coal Company. The obligations of the old Reading Railroad and of the Coal and Iron Company, amounting in 1896 to about $100,000,000 were taken over by the Holding Company, and blanket bonds were issued on the combined properties of the railroad and the coal company, the Holding Company, however, paying all the interest on the bonds.[76] It would be necessary either to redeem these bonds if the existing coal company is to be utilized as a sales' agency, or else to create a separate and distinct corporation as was done by the Lehigh and the Lackawanna.

The bituminous roads have not yet announced any specific plan. It is understood, however, that they are avoiding a technical violation of the law by carrying on their coal business through their subsidiary companies. It appears from the annual reports of the Union Pacific that that railroad is disposing yearly of large areas of its properties,[77] and it is also stated that valuable coal lands claimed by this railroad have been voluntarily returned to the federal government without testing title in the courts.[78] It also appears that the Louisville and Nashville has apportioned among its stockholders practically all the stock of its subsidiary

74 Annual Report 1912, pp. 7, 13.
75 Annual Reports 1909, 1910, pp. 10, 11 in both reports.
76 Brief for government, filed May, 1914, pp. 46-49.
77 Annual Reports, 1910-12.
78 Rates and Regulation, by W. Z. Ripley, pp. 554, 555.

coal company, the Louisville Properties' Company, retaining only about $35,000 of stock in trust for stockholders.[79]

VII. Further Adjudication Involving Anthracite Combines.

1. The Delaware, Lackawanna and Western Interests.—About the last of February, 1913, the Department of Justice, acting on authority of the decision of the Supreme Court in the commodities' cases and the more recent decision in the suit to break up the combination centering in the Temple Iron Company,[80] brought suit in the District Court for the District of New Jersey against the Delaware, Lackawanna and Western Railroad and the Delaware, Lackawanna and Western Coal Company. Counsel for the government alleged those relationships which we have described above, and petitioned the court to enjoin the railroad from

> "shipping, transporting, or causing to be transported any anthracite coal, the product of mines owned by defendant railroad company or purchased by it from others and sold, transferred, or delivered to defendant coal company in pursuance of the above-described agreement or arrangement between them or any similar one;
>
> "That the court adjudge the existing arrangements and agreements between the defendants to constitute a contract and combination in restraint of trade and commerce among the states and an attempt to monopolize a part of such trade and commerce contrary to the provisions of the Act of July 2, 1890, and that further violations of said act in the ways specified or any similar ones, be enjoined;
>
> "That the court adjudge the purchase of coal by the defendant railroad company from others and the sale or transfer of the same to the defendant coal company, or any other party, to be unlawful, and enjoin any such future action."[81]

As may be seen from the government's demands, both the Commodities' Clause and the Sherman Anti-trust Law are here relied on to force the railroad to discontinue the very ingenious device to which it had resorted in order to evade a technical violation of the law. This device, as shown above, consisted in the organiza-

79 Annual Report Table 3.
80 Chapter IV, Section 5.
81 U. S. vs. D. L. & W. R. R. Co. et al., filed Feb., 1913.

tion of a coal company which should purchase the output of the railway's mines prior to the act of shipment.[82]

The district court, in an opinion rendered April 7, 1914, adhered to the technical ruling that the railroad and the coal company were separate and distinct entities and that the former did not own the coal during transit but had in good faith transferred it to the latter before the act of transportation began. The court refused to interfere with the 65 per cent contracts, regarding them merely as "a convenient basis for calculating the price to be paid for future deliveries"—as "simply an interest in the price" and not "an interest in the coal"; that the coal, after it had been loaded on the cars, became the property of the coal company which had full power to determine where it should be shipped and what prices should be asked. Little attention was given to the allegations brought under the Anti-trust act, because, said the court, "the oral argument left us under the impression that this charge was not much insisted on.....If we are mistaken in this supposition the error can easily be corrected." The petition was accordingly dismissed and the government appealed the case.[83]

The Supreme Court first considered the position taken by the lower court, viz: "that it was not illegal for the same person to own a majority of the stock in the two corporations and that their contract of sale was lawful."[84]

> "It would not necessarily be illegal," said the court, "for the road to transport coal belonging to a corporation whose stock was held by those who owned the stock of the railroad company....., but mere stock-ownership by a railroad, or by its stockholders in a producing company cannot be used as a test by which to determine the legality of the transportation of such company's coal by the interstate carrier."[85]

In order to substantiate this statement, the court cited the refusal of Congress to amend the Commodities' Clause by making it unlawful for any railroad to transport coal belonging to a company in which the said railroad owned stock.[86] It declared, however, that

82 Chapter IV, Section 6.
83 213 Fed. 240, 260-263.
84 U. S. vs. D. L. & W., June 21, 1915 (not yet reported).
85 Do.
86 Cong. Rec., 59th Cong., 1st Sess., pp. 7011, 7012.

> "whenever two such companies, thus owned or managed, make contracts which affect the interests of minority stockholders, or of third persons, or of the public, the fact of their unity of management must be considered in testing the validity and bona fides of the contracts under review."[87]

In the case in hand the coal company was created, said the court,

> "with the express purpose that, with stockholders in common, it should be a party to a contract intended to enable the railroad company to meet the requirements of the Commodity Clause and at the same time continue the business of buying, mining, selling and transporting coal."[88]

Here the railroad did not relinquish its title to the coal lands; whereas in the Delaware and Hudson case above cited,

> "the ownership of the mines had passed completely from the railroads to the producing companies and the coal property was no longer subject to the debts of the railroad companies.....The fact that the railroad (Delaware and Hudson) held stock in the producing company, and received dividends thereon, did not give to the railroad company, any more than to any other stockholder in any other corporation, a legal interest in the property of the coal company."[89]

The court recognized, however, that "by means of stock-ownership one of such companies may be converted into a mere agent or instrumentality of the other," as had been clearly implied in a previous decision.[90] It held, however, that such relationship need not necessarily result from stock-ownership but may result from "any contract which in its practical operation gives to the railroad company a control or an 'interest, direct or indirect' in the coal sold, at the mouth of the mines."[91]

> "If the contract amounted to a sales agency," said the court, "the transportation was illegal because the railroad company could not haul coal which it was to sell in its own name or through an agent. If the contract was in restraint of trade it was void because in violation of the Sherman Anti-trust Law. The validity of the contract cannot be

87 U. S. vs. D. L. & W., June 21, 1915, (not yet reported).
88 Do.
89 Do.; also 213 U. S. 413.
90 U. S. vs. Lehigh Valley R. R., 220 U. S. 257, 273.
91 Same as (87).

> determined by consideration of the single fact that it did provide for a sale. It must be considered as a whole and in the light of the fact that the sale at the mine was but one link in the business of a railroad engaged in buying, mining selling and transporting coal."[92]

Much significance was attached to the fact that the railroad reserved the power to limit deliveries "as its interests may determine," to prevent the coal company from purchasing coal elsewhere without the written consent of the railroad, and to require the coal company to fill the orders of the railroad's customers "even though as to some of such customers the sales may be unprofitable."[93] In the opinion of the court such provisions clearly indicated that "the railroad had an interest in the coal and used the coal company to preserve and secure that interest after transportation began."[94] The coal company was clearly under unlimited obligations to the railroad, the latter in turn incurring no obligation whatsoever to the coal company. In this manner the railroad had eliminated the coal company as a competitive purchaser of coal other than that offered by the railroad.

> "Such a provision," said the court, "may not have actually effected a monopoly; but considering the financial strength of the carrier; its control of the means of transportation; its power to fix the time when the transportation of the very coal sold should begin; its power in furnishing cars to favor those from whom it bought or to whom it sold—such a contract would undoubtedly have that tendency. In that respect it was opposed to that policy of the law, which was the underlying reason for the adoption of the Commodity Clause."[95]

In view of the facts above summarized the court concluded that the "coal company was neither an independent buyer nor a free agent";[96] that the contract was in violation of both statutes; and that the railroad must therefore

> "absolutely dissociate itself from the coal before the transportation begins.....It cannot," said the court, "retain the title nor can it sell through an agent. It cannot call that agent a buyer while so hampering and restricting such alleged buyer as to make him a puppet subject to the con-

92 U. S. vs. D. L. & W., June 21, 1915 (not yet reported).
93 Do.
94 Do.
95 Do.
96 Do.

trol of the railroad company."[97] The decree of the lower court was accordingly reversed with directions "to enter a decree enjoining the railroad from further transporting coal sold under the provisions of the contract of August 2, 1909....."[98]

2. The Reading Interests.—The action involving the Reading interests was brought in the District Court for the Eastern District of Pennsylvania and the decision rendered prior to the decision of the Supreme Court in the Lackawanna case.[99] The government filed a petition for an injunction to prohibit the Reading Company, the Philadelphia and Reading Railway Company, and the Philadelphia and Reading Coal Company, and their officers "from further carrying out or maintaining such conspiracies, combinations, attempts to monopolize, and monopolizations," and to prohibit the railway in question from the carrying in interstate commerce "of anthracite mined or purchased and at the time of transportation owned" by those coal companies which it dominated.[100] The wording of the petition included the so-called minor combinations referred to above and dismissed by the court, without prejudice, for further action.[1]

The Reading Company, it will be remembered, is a holding company, owning all the stock of the Reading Railway and the Reading Coal Company. In addition, the Reading Company owns the stock of the Wilmington and Northern Railroad, the Schuylkill Navigation Company, and the Central Railroad. The last named company owns all the stock of the Wilkes-Barre Coal Company, part of the stock of the Hudson River Railway, and controls through lease the Lehigh and Susquehanna Railroad. The Lehigh Navigation Company owns the stock of the Lehigh and Susquehanna Railroad and part of the stock of the Hudson River Railway, and is therefore linked to the Reading interests through the Central Railroad. The Navigation Company, furthermore, owns the stock of the New England Railroad.[2] The government

97 U. S. vs. D. L. & W., June 21, 1915 (not yet reported).

98 Do.

99 Chapter IV, Section 7.

100 Petition in D. C. of U. S., E. D. of Penna. of Gov't in U. S. vs. Reading Co., P. & R. R. Co., P. & R. Coal & Iron Co., Central R. R. of N. J., the L. & W.-B. Coal Co., et al., and Geo. F. Baer, Geo. F. Baker, et al., p. 70.

1 Supra p. 115.

2 Petition in D. C. of U. S., E. D. of Penn'a of Gov't in U. S. vs. Reading Co., et al., pp. 69-75.

prayed for a decree requiring these corporations to dispose of such capital stock, under the supervision and direction of the court, to persons not their stockholders or to agents not otherwise under their control or influence, and that "pending such disposition the holding corporation be enjoined from voting or receiving dividends in respect to any part of said stock."[3] The court was further petitioned to restrain the Reading Railway, the Central Railroad, and the Lehigh and Susquehanna Railroad, from the transportation of coal mined or produced and at the time of transportation owned by them.[4]

a. Application of the Sherman Anti-Trust Law.—That part of the bill involving the Wilmington and Northern Railroad was dismissed at once because it appeared that the coal transported by this road constituted a negligible part of its tonnage.[5] The court likewise dismissed the charge that the Navigation Company and the Central Railroad owned stock in the Alliance Coal Company and the Wilkes-Barre Coal Company. In putting this part of the bill aside the court said that the evidence did not show that the holdings in question had been "unlawfully used in combination or otherwise," but that "the Navigation Company and the Wilkes-Barre Coal Company have been active competitors for the sale of coal." It is probable that the stock held by the Central Railroad in the Alliance Coal Company and by the Navigation Company in the Wilkes-Barre Coal Company, are scarcely sufficient in themselves to eliminate competition between the Navigation Company and the Central Railroad although very strong evidence was introduced by the government to show that an effective agreement existed between these interests.[6]

In order to understand the relationship existing between the Reading and the navigation groups we must examine the agreement by which the Lehigh and Susquehanna Railroad, a subsidiary of the Navigation Company, was leased to the Central

3 Petition in D. C. of U. S., E. D. of Penn'a of Gov't in U. S. vs. Reading Co., et al., p. 70.

4 Do. pp. 73-75.

5 U. S. vs. Reading Co. et al., June 3, 1915 (not yet reported).

6 The Central owned only 6,000 shares in the Alliance Coal Co. out of a total of 90,000 shares, 80 per cent of the balance being owned by the Navigation Co. The latter owned only 500 shares in the Wilkes-Barre Coal Co., out of a total of 184,250 shares, all but 13,927 of the balance being owned by the Central. U. S. vs. Reading Co. et al,. June 3, 1915 (not yet reported).

Railroad, a subsidiary of the Reading Company. The original agreement, dating back to 1871, stipulates that the Navigation Company should receive one-third of the gross receipts arising from the operation of the railroad, in return for which the entire output of the mines, with several insignificant exceptions, was to be shipped over the leased railroad or other roads controlled by the Central.[7] The lease was at one time transferred to the Reading with a proviso that the Central would require its subsidiary, the Wilkes-Barre Coal Company, to ship its output over the Lehigh and Susquehanna, and, if the one-third of the gross receipts as stipulated in the original lease, should fall below $1,114,400, the Reading would supply the deficit; whereas if they should go beyond $2,043,000, the surplus would be turned over to the Reading.[8]

The government maintained that in practice "the Navigation Company can not avoid shipping over the leased railroad and over the Central Railroad by consigning its output to points not on, or reached via those lines, but is bound absolutely to ship over such lines three-fourths of its output excepting coal shipped over its canal"[9] (only about six per cent in 1912).[10] As a result the Central Railroad had absolute control of at least three-fourths of the entire coal output arising from the properties of the Navigation Company. This was clearly affirmed by President Warriner, of the latter company, in his testimony.[11]

In 1887 an agreement very similar to the above was entered into between the Central and the Navigation Company affecting the output of the Wilkes-Barre Coal Company.[12] In 1892 the agreement was further strengthened and in 1897 and 1908 its force was clearly recognized by the Coal Company and the Navigation Company.[13] In 1913 over 5,000,000 tons were shipped over the lines of the Central, leaving but 367 tons to be distributed among other routes.[14] In view of this evidence of the Central's monopoly upon the output of the Wilkes-Barre Coal Company,

7 Brief for Gov't filed May, 1914, pp. 181, 182.
8 Do. pp. 182, 183.
9 Do. p. 185.
10 Do.
11 Do. p. 186.
12 Do. pp. 186-188.
13 Do. 188-190.
14 Do. p. 189.

the government charged an unreasonable restraint of trade in anthracite coal by which competition between the Navigation Company and the Wilkes-Barre Coal Company in the production and marketing of coal was virtually eliminated. The government prayed for a decree dissolving the leases and agreements or else for such modifications as would restore competitive conditions.[15]

In considering the petition the court said, "If the lease is not in violation of the law, the navigation group drops out of this litigation."[16] Little weight was given the government's contention and the evidence submitted regarding the suppression of competition between the Navigation Company and the Wilkes-Barre Coal Company. On the other hand, "the lease fostered competition," said the court, meaning, as later explained that the Navigation Company was thereby able to place its coal on the market to compete with that of other companies and the Central was thus enabled to enter the anthracite fields.[17] In further explanation the court said,

> "It should be distinctly noted that with rare exceptions competition for the carriage of the same anthracite coal does not exist. Each carrying company has its own tributary lines, and (largely by reason of topographical conditions) these are not reached, and are not likely to be reached, by any other carrier.....The competition is in the markets, and it would be idle for one carrier to attempt to interfere with the other's traffic."[18]

As if not fully satisfied with the explanation given, the court calls attention to the fact that industrial and financial conditions in 1870 and 1871 necessitated the arrangement. In the latter year the Board of Managers of the Navigation Company declared that the Lehigh and Susquehanna Railroad lacked terminal and track facilities which it was unable to supply. It was said that the lease would enable it to place its output in the New York markets and would also

> "leave it (the Navigation Company) a coal and navigation company, with its canal and valuable Lehigh coal property, its large amount of real estate,.....and in addition the

15 Brief for Gov't filed May, 1914, pp. 201, 202.

16 U. S. vs. Reading Co. et al., D. C. of U. S., E. D. of Penna., July, 1915 (not yet reported).

17 Do.

18 Do.

recently acquired tracts of first class coal lands in the Wyoming region which promise in the future to be a large and increasing source of revenue; also the control of the transportation of the product of other tracts equally large and more fully developed."[19]

The Sherman Anti-trust Law of 1890 was designed primarily to break up just such alliances as resulted from the leasing of the Lehigh and Susquehanna Railroad to the Central. Even although conditions at that time may have justified the lease, the federal statute rendered the action unlawful. If there is justification now it must be found elsewhere than in an emergency arising many years before the enactment of the law. The lease, judging from the whole trend of the evidence submitted by the government, undoubtedly gave the Reading Railroad through its subsidiary, the Central, a stronger grip on the situation in the anthracite fields. It may truly be said that the Reading Holding Company was thereby better able to compete with large and small operators, but it may be pertinent to inquire as to whether this company has not now become so powerful as to be able to hold its own without such agreements and even so to dominate the situation in the anthracite fields as to render the successful operation of private concerns extremely difficult if not impossible. The court also followed out the operation of the agreement by which the Central was entitled to receive for transportation three-fourths of the entire output of the coal properties of the Navigation Company. Although the testimony of officials[20] indicated beyond question that the agreement was absolutely binding, it was pointed out that there were years when the percentage fell a little below the three-quarter mark. The court attached much importance to this. It was concluded that the government had failed to prove the unlawful restraint of trade charged to exist as a result of the relationship between the two groups, and that part of the bill referring to the Navigation Company was dismissed.[21]

In considering the combination resulting from the Holding Company's ownership of the stock of the Reading Railway and

19 U. S. vs. Reading Co. et al., D. C. of U. S., E. D. of Penn'a, July, 1915 (not yet reported).

20 Testimony of President Warriner, Brief for Gov't, filed May, 1914, p. 186.

21 Same as (19).

the Reading Coal Company, the court propounded and attempted to answer the following questions: "Is the combination unlawful? Does it unreasonably restrain trade in anthracite coal?"[22]

The government had made the point that the Reading Coal Company and its lessees were required to ship their entire product over the lines of the Reading System or over such lines as the Reading might dictate. This position was sustained by the court although its importance was discounted since most of the lessees "have no other railroad available."[23]

It was charged in the government's brief, that the old Reading Railroad Company had supplied the Coal Company with money and credit (amounting by 1896 to about $81,000,000) to enable the latter to acquire vast areas of land in order "to prevent their acquisition by others";[24] and that the holding of these lands in an unproductive state was a serious financial burden upon the railroad since the loans were granted without interest.[25] The court said in answer to these allegations that it was quite natural and normal for the Coal Company to increase its holdings even "beyond its present needs,"[26] and refused to go into the admittedly improper acts of the parties prior to the reorganization of 1896.

The government's charge affecting the group of interests centering in the Reading Holding Company, was sustained by the court.[27] The latter called attention to the fact, however, that the severing of the relationship between the Holding Company and the Central would injuriously affect the traffic in other materials not objected to in the government's bill, and

> "unless the friendly and mutually advantageous alliance of the two railroads in this particular must be destroyed in order to reach an unlawful combination in another particular that would otherwise escape, we are not disposed to disturb the ownership of the Holding Company in the Central Railroad's stock.....The two coal companies must also be taken into account, and in our opinion it is their union that lends most force to the government's complaint. As we understand the facts, if the Central Railroad were divorced from the Wilkes-Barre Coal Com-

22 U. S. vs. Reading Co., et al., D. C. of U. S., E. D. of Penn'a, July, 1915 (not yet reported).

23 Do.

24 Do. Brief for Gov't, filed May, 1914, pp. 52-55.

25 Do. p. 53.

26 Same as (21).

27 Do.

pany, the object of the bill would in this respect be substantially attained, and (as this particular matter was not argued by counsel) we suggest it for their consideration when the scope of the decree comes to be determined."[28]

The court clearly recognized the presence of an unlawful combination but, as shown above, did not commit itself specifically and finally as to the exact nature of the illegality or the remedy that should be employed.

b. Application of the Commodities' Clause.—In passing upon that feature of the case involving the Commodities' Clause, the court brought out nothing new, considering itself restricted to the findings of the Supreme Court in earlier cases. It refused to apply the findings in the Lackawanna case[29] to the case in hand because in the latter "there has been no change or attempted change of ownership or interest in the coal—the railway has never owned it," said the court, "or had any legal interest therein."[30] As in former cases it was considered that the holding of stock did not in itself constitute such an interest as the law was designed to prohibit, and that the further evidences submitted by the government that the Coal Company was merely a department or agency of the Holding Company were not sufficient "to destroy the entity of the producing or owning corporation."[31] It was concluded therefore "that the Commodities' Clause has not been violated by the Reading Companies."[32]

The opinion gave much attention to the fact that most of the relations complained of were freely permitted under state charters long prior to the enactment of the Commodities' Clause. Although this should undoubtedly be taken into consideration in effecting the adjustment of the affairs of the several companies, it would seem to be irrelevant to endeavor to justify the virtual violation of a federal statute by showing that the acts complained of were freely permitted under state law prior to federal legislation rendering such acts unlawful in so far as they bore directly or indirectly upon interstate commerce. Indeed this point has been

28 U. S. vs. Reading Co. et al., D. C. of U. S., E. D. of Penn'a, July, 1915 (not yet reported).

29 U. S. vs. D. L. & W. et al., S. C. of U. S., June 21, 1915 (not yet reported).

30 Same as (28).

31 Do.

32 Do.

passed upon again and again by the Supreme Court until it has become clearly established that the acts of Congress, as affecting interstate commerce, take precedence over any state laws not in harmony with such acts.[33]

The government offered what appears to be very conclusive evidence that the Reading Coal Company was originally created to own and operate anthracite coal mines[34] which could not be so owned or operated directly by the railroad both because of limitations in the charter of the latter[35] and an amendment to the Constitution of Pennsylvania prohibiting a common carrier from engaging directly or indirectly "in mining or manufacturing articles for transportation over its works."[36] The arrangement with the Coal Company, however, enabled the Reading interests to absorb virtually all the coal lands hitherto held by rival interests,[37] such lands comprising "over 60 per cent of all the coal lands in the Schuylkill region" and between 40 and 50 per cent of all the unmined anthracite in Pennsylvania."[38]

Very conclusive evidence was likewise submitted to show that rebates had long been granted to the Reading Coal Company, and, when such outright rebates became unlawful, the Holding Company made advances at unreasonably low interest rates, such rates ranging from 1 to 2½ per cent.[39] In this manner, as stated in the report of the Interstate Commerce Commission rendered July 30, 1915, "the burden of interest charges on capital invested in coal-mining operations is thus lifted from those operations and is cast upon the Reading Railway rates and earnings."[40]

> As a result, said the Commission, "Published rates are of no significance to this shipper, the Philadelphia and Reading Coal and Iron Company, under such circumstances. The same executive officials control and administer the affairs of the railway company, the coal and iron company, and the holding company; therefore the coal and

33 U. S. vs. Trans-Mo. Frt. Assoc., 166 U. S. 290, 342; Armour Pckg. Co. vs. U. S., 209 U. S. 56; U. S. vs. D. & H. Co., 213 U. S. 366.

34 Brief for Gov't, U. S. vs. Reading Co. et al., D. C. of U. S., E. D. of Penn'a, filed May, 1914, pp. 37, 38.

35 Penn'a Laws, 1833, Section 2, p. 146.

36 Penn'a Const., Art. XVII, Section 5.

37 Same as (34), pp. 39, 40.

38 Annual Reports Reading R. R., 1880, 1881, 1891.

39 Same as (34), pp. 55-57.

40 Report I. C. C. No. 4914, pp. 240, 241.

> iron company receives offsets, against such published rates, in the form of interest charges which are waived by the same parties who are charged with the duty of collecting and retaining the full published tariff rates on all shipments."[41]

The Commission had not rendered the report above referred to at the time of the decision in the Reading case, but the government in its brief presented very conclusive evidence that the Coal Company was, and is at this time, nothing more than a department of the railway. The fundamental facts as found by the government were strongly substantiated by the exhaustive report of the Commission, which summed up the situation in the declaration that, "The carrier and the coal company are but the subsidiary corporate hands of the holding company, in as much as the same interests direct and administer the affairs of the three corporations."[42]

It is understood that the Department of Justice is preparing an appeal of the case to the Supreme Court.

3. The Lehigh Valley Interests.—In the spring of 1914, the government filed its revised petition[43] against the Lehigh Valley Railroad Company in the District Court of the United States for the Southern District of New York. The suit was based on the alleged violation both of the Sherman Anti-trust Law and the Commodities' Clause, although argument was directed primarily toward the latter charge. In that part of the bill alleging violation of the Commodities' Clause, it is declared that the Lehigh Valley Coal Sales Company was formed for the specific purpose of evading the prohibitions of the law; that over 80 per cent of the capital stock of this company were owned by the majority stockholders of the Lehigh Railroad; and that the monopoly privileges thus accruing have enabled the Coal Sales Company to turn over large dividends to its stockholders (for the most part the same as the railroad's), amounting to 2½ per cent quarterly, in addition to an extra cash dividend of 25 per cent and what amounted to a stock dividend of 25 per cent, both having been declared in November, 1913, after twenty-one months of operation of the Coal Sales Company; that the company, after turning over such large profits to stockholders, possessed a surplus of

41 Report I. C. C. No. 4014, p. 241.
42 Do. p. 240.
43 Supra p. 113.

over a million and a quarter dollars; and that the contracts of the Lehigh Valley Railroad and the Lehigh Valley Coal Company with the Coal Sales Company (here the bill gave details of the agreement entered into with the Sales Company. The facts are very similar to those given above with reference to the Delaware, Lackawanna and Western) are not such bona fide transactions as take place between separate corporations.[44]

The decision in this case was rendered December 21, 1914, prior to the decision of the Supreme Court in the Lackawanna case.[45] The court dismissed the case "so far.....as the Commodities' Clause is concerned.....with the statement that there is no great difference between what the Lackawanna Railway did and was upheld in doing by all the circuit judges of the third circuit"[46] and what the Lehigh Valley Railroad has been doing as shown in this case. Doubtless the decision would have been different had it followed, instead of preceded, the decision of the higher tribunal in the Lackawanna case. "Without further discussion," concluded the court, "it is held that nothing in the bill charged constitutes a violation of the Commodities' Clause if the decision in the Lackawanna Coal Sales case is right." The court then attempted to sum up the whole situation in the following language:

> "The coal lands are lawfully owned; the coal therefrom is lawfully carried; there is an actual and honest dissociation of interests between coal owned and coal carried; .....no monopoly of interstate commerce is shown nor any attempt to monopolize. For the proof of the pudding is in the eating thereof, and it is impossible to find any of the normal results of monopoly without also finding violations of the Commodities' Clause—and none is discovered."[47]

In charging monopoly and restraint of trade the complaint alleges that the road

> "completely dominates the market at all points thereon not reached by another railroad and has the power to fix, has fixed and does fix, without the check of competition, the

44 Petition of Gov't, U. S. vs. Lehigh Valley R. R. Co. et al., D. C. of U. S., S. D. of N. Y., filed March, 1914.

45 Supra pp. 121-124.

46 Do.

47 U. S. vs. Lehigh Valley R. R. et al., D. S. of U. S., S. D. of N. Y., July 21, 1914.

> prices at which anthracite is sold at such points.....that it has prevented the building of any new railroad into the anthracite region served by it and has kept the independent producers under the disadvantage of having to ship over a railroad also engaged in the coal business."

It is further claimed that the railroad controls, through the Lehigh Valley Coal Company and affiliated companies, more than 80 per cent of the gross tonnage of the railroad in anthracite coal, such tonnage amounting annually to about 14,000,000 tons, and that the Coal Company is nothing more than "a mere adjunct, department or instrumentality of the Lehigh Valley Railroad."[48]

In reply to the government's allegations, the court said, "there can be no restraint without control, and since the railroad does not control the coal it carries, it has no means of restraint."[49] With this statement the bill was dismissed.

It is difficult to reconcile the sweeping nature of the court's conclusions with the evidence as presented by the government and substantiated by the report of the Interstate Commission which has just appeared. The Commission found that the entire capital stock of the Coal Company was owned by the railroad; that large sums of money for operating expenses had been advanced to the Coal Company by the carrier and charged off by the latter to its profit and loss and income accounts; that, in 1905, the carrier transferred securities to the Coal Company representing coal-mining properties valued at more than $10,000,000; that the Coal Company settled for the property by giving its own certificates of indebtedness upon which, prior to 1912, no interest was paid; that the Coal Sales Company, according to a written contract, ships and markets all coal mined or purchased by the Coal Company; that the stockholders of the railroad own virtually all the stock of the Coal Sales Company, such stock having been bought by the former with extra dividends declared by the railroad for this specific purpose; and that the railroad is guarantor of $11,500,000 bonds issued by the Lehigh Valley Coal Company.[50] In this summary we have introduced only such facts as were borne out by the investigation of the Interstate Commerce Commission, although a vast amount of additional evidence was

48 Petition of Gov't, U. S. vs. Lehigh Valley R. R. et al., D. C. of U. S., S. D. of N. Y., filed March, 1914.

49 Same as (47).

50 Report I. C. C. 4914, pp. 245, 246, 225, 252, 284, respectively.

submitted by the government in support of its contentions. This has been omitted because it is quite similar to that found in other cases and treated at length above.

The Department of Justice is likewise understood to be preparing an appeal. It may be fairly assumed that the principles of law applied in the Lackawanna case above discussed will likewise be applied in the Lehigh Valley case.

CHAPTER V.

INADEQUACY OF THE COMMODITIES' CLAUSE—PROPOSALS CONSIDERED.

I. Deficiencies of Existing Statutes.

The decision in the Lackawanna case will, of course, necessitate the abolishment of the coal sales company as an actual department and agent of the railway but it will not affect coal companies bearing a lesser relationship *although such relationship might be sufficiently effectual;* nor will it have any bearing upon the railroad as a producer and seller of coal further than to enjoin the carriage of coal produced by the railroad and *sold before carriage to a coal company wholly dominated by the former. This leaves the railroad free to own and operate coal mines and any producing and manufacturing concerns which it may desire to own and operate; and permits the sale of coal to companies all but dominated by railway interests. In other words, even assuming decisions in the other anthracite cases similar to that in the Lackawanna case, an interstate railway may still engage in any line of business formerly permitted, provided it does not carry the merchantable product resulting therefrom while it is the owner thereof, or receive for carriage a product which it has "sold" to an agency or corporation wholly dominated by it.*

A very similar issue is presented where railway officials or employees own stock in adjacent coal mines. The extent and effect of such holdings have already been fully discussed.[1] The courts have not yet met this issue squarely, and, in view of the construction placed upon the words "directly or indirectly," it is assumed that existing statutes will not be construed to affect such holdings. Nor have the courts passed upon the specific issue presented by the interlocking of directorates. It is difficult to consider this feature apart from the present relations existing between the coal roads and the coal sales' corporations since their interests appear entirely merged not only through common directors but through common officials and stockholders and financial interests. The interlocking of directorates, however, may be regarded as a dis-

1 Chapter II, Sections 3, 4, and 5.

tinct problem, since entirely diverse financial interests may very readily eliminate competition and foster monopoly control by becoming parties to such relationships.

Again the selection of officials in one corporation for similar offices in another, whose policy it is to the interest of the former to control, renders impossible a separate and distinct existence. In fact the extent of the influence of the officials-in-common to control the policy of the company which the original corporation has created or desires to control is measured only by the power of such officials to make the subordinate corporation a mere instrumentality of the principal. Where the board of directors is entirely different the power of the officials-in-common to mark out and advantageously correlate the policies and operations of the concerns in question is undoubtedly great; where such officials may control all, or a majority, of the directors in both corporations that power is absolute. Where interests supplementary in their nature, such as the businesses of production and of transportation, are so correlated, independent industries can not thrive; not only so but they must inevitably yield themselves to similar joint operators or withdraw from the field after disposing of their plants to those concerns engaged in both producing and transporting. Amendments looking to a severance of the business of production, mining and manufacturing, from that of transportation should therefore include provisions restricting or regulating both the interchange of directorates and the selection of officials in common.

Again the matter of the origin of commodities presented for transportation is of fundamental importance. It has been clearly decided that Congress may prohibit an interstate railway from receiving and transporting commodities in interstate commerce which it owns at the time of such reception and transportation; but it remains to be ascertained as to whether Congress may likewise prohibit, *if the carrier in question has itself manufactured, mined or produced the commodity* but *has sold it prior to receiving it for transportation.* In the light of the court's interpretation which has been presented above, this issue will not be met until the existing statute has been so amended by Congress as to raise the specific question of the power of Congress to so legislate. In the light of the principle laid down by the Supreme Court that Congress may prohibit railways from transporting in interstate commerce commodities owned by it, it is believed that Congress

likewise has power to establish similar prohibitions affecting the manufacture, mining and producing of such commodities where it clearly appears that the result attained in the latter case is similar to that in the former. This contention is substantiated in an earlier decision of the Supreme Court where it was laid down that even "if the result of applying the prohibitions as we have interpreted them will be practically to render it difficult, if not impossible, for a carrier to deal in commodities, this affords no ground for relieving us of the plain duty of enforcing the provisions of the statute as they exist. This conclusion follows since the power of Congress to subject every carrier engaged in interstate commerce to the regulations which it has adopted is undoubted."[2]

Briefly summarizing the above observations, it appears that the present law as construed is deficient in that it permits a railway to own and operate mining, manufacturing, or producing concerns, and transport the products thereof, provided only that such products be sold prior to presentation for shipment; and to maintain relations with mining, manufacturing, or producing concerns, through stock ownership, or interchange of directors or officials, or otherwise, which enable such railway to carry on operations in virtual violation of the law.

II. Proposals Considered.

1. The Leasing System as Applied to Coal Lands Owned by the State. We are of the opinion that vested property rights should not be interfered with by the state so long as such rights are administered with proper regard for the interest which society may maintain in them; but the state, the creator, should ever regard the public interest as paramount and should hold corporations, enjoying valuable franchises to a strict account. This is especially true with regard to our coal deposits. They are limited; they can not be replaced; they are necessary for our present and future comfort and our economic development. Any corporation or individual owning these our most valuable mineral deposits is therefore responsible for the proper administration of them. The state which grants the right should see to it that the properties are economically operated and the product supplied to consumers at reasonable prices.

2 N. Y., N. H. and H. vs. C. and O. R. R., 200 U. S. 361.

It is not such a difficult matter to settle upon a satisfactory method of operating coal mines now owned by the federal or state governments. The leading authorities seem to agree that the ideal plan would consist in the state's retaining the title to all such properties and leasing them to private corporations or individuals upon clearly stated principles of operation. This plan is especially advisable from the standpoint of conservation. It would also serve as a valuable regulator of conditions of operation as well as the price of the product, especially in those regions where state mines are of sufficient importance to offer substantial competition to private interests.

The federal government still retains title to a very large area containing valuable coal deposits. During the two previous administrations about 90,000,000 acres of coal lands were withdraw from entry in the United States; and, in 1906, all the workable anthracite and bituminous coal fields in Alaska, not yet occupied, were likewise withdrawn from entry. The latter action affected 800,000 acres of valuable coal lands and in addition a vast area containing coal-bearing rock.

Several of the western states, notably Wyoming and Colorado, have introduced the leasing system as the basis of operating public coal lands.[3]

The Wyoming system was inaugurated in 1907. It provides, that the lessee begin prospecting within sixty days after securing the lease, and undertake actual mining operations within six months if workable deposits are found; that the work be carried on economically and efficiently; that a certain minimum royalty be paid when the lease is granted, this amount being credited to the lessee on total royalties due, payments being made monthly; that privileges under the lease extend only to coal deposits, the surface being reserved for other purposes; that lessee render an accurate record of all coal mined, submitting the same to the State Board of Land Commissioners, the latter having access to all the books and accounts of the operator and employing other means of checking up reports; that a royalty of ten cents be paid on each short ton less one-twelfth of the minimum annual royalty mentioned above; that the superintendent of the mineral department of the state board have supervision over all mining operations; that the lessee may not assign or sublet his privileges

3 Geo. H. Ashley, Bulletin 425, U. S. Geological Survey, p. 45.

without the permission of the state board; and that failure to obey these regulations shall lead to a termination of the lease.[4] It is stated that the total cost of collecting royalties due does not exceed five per cent of the amount accruing to the state.[5]

A system similar to that of Wyoming is in operation in Colorado, the only important difference being a descending scale of royalties, ranging from six to three cents as the output increases. This is, of course, a strong incentive to carry on active operations although it would work a hardship to lessees of mines of small capacity.

Shortly after the Wyoming and Colorado plans went into effect, the then Secretary of the Interior, in his annual report, gave very decided approval to the leasing principle. He recommended that some similar method be employed with regard to the federal coal lands. He declared that the "chief object to be attained in any such legislation is to conserve the coal deposits as a public utility and to prevent monopoly or extortion in their disposition"; that the right to mining privileges should be distinct from title to the soil; that the public mines would be best conserved and most equitably administered if the government would retain title and lease to individuals or associations "with restrictions on their mining and use which would control the minimum output and conserve the deposits."[6] The proposals of the department were not presented in detail but the general method suggested was very similar to that employed by Colorado and Wyoming.

The leasing system possesses two fundamental possibilities: (1) the proper conservation of our coal resources; and (2) the sale of coal to the consumer at a fair and reasonable price. The first result may be secured by maintaining strict supervision over all mining processes so as to avoid waste, or scraping or any careless method of operation. Such supervision should not only apply to individual mines but to the entire area of public coal lands. Leases should be granted annually only to such a proportion of the mines as the demand and total available supply justify, due regard being given to the output of privately owned mines as well as the conservation of the entire public deposits. Furthermore, the capacity of properties should be carefully ascertained by min-

4 Geo. H. Ashley, Bulletin 425, U. S. Geological Survey, pp. 45-47.
5 Do. p. 47.
6 Annual Report of Secretary of Interior, 1909.

ing engineers and a proper apportionment made among individuals and associations taking out leases. Every party receiving a grant should be required to show his financial and mechanical ability to carry out the provisions of the lease. The government itself should do the prospecting and the lessee should be prepared to enter upon actual operation within a reasonable time.

The second object, the maintaining of a fair price level, may be attained by writing into the lease as a condition precedent to operation under it, such requirements as are in accord with the government policy. It would be necessary in developing the properties as a public utility to have control of the price of the product. In order to ascertain what this should be, the workable value (considering the cubic content, character of seam, and general conditions existing) would have to be carefully estimated. The government's mining experts and accountants should estimate cost of equipment, overhead expenses, interest charges on capital invested by lessee, and the sinking fund necessary to meet depreciation of the plant. On this basis the operator could be permitted a reasonable per cent profit. It would be necessary, of course, to grant leases for a given period of years in order to justify the investment of capital by the lessee. It seems generally agreed that a period of fifteen or twenty years would be adequate, the government reserving the privilege of withholding extensions or of changing the conditions.[7]

The financial terms of the lease should require a royalty on each ton taken out of the mines. This amount should be gauged by the quality of coal and the expense of operation. The royalties suggested range from three to ten cents per ton. The royalty plan employed by the State of Wyoming has a descending scale as output increases.[8] Such a system if properly supervised might be advantageous; ordinarily it would seem to place the smaller producer at a disadvantage.

Allotments should be of such extent as to justify the introduction of modern equipment, thus enabling operators to carry on the work efficiently and economically, and to compete with privately owned mines. Care should be observed, however, that no

7 Chas. R. Van Hise, The Conservation of Natural Resources, pp. 43, 44; also Wharton Barker before Senate Committee on Interstate Commerce, 62d Cong., Hearings, pp. 605, 627.

8 Geo. H. Ashley, Bulletin 425, U. S. Geological Survey, p. 46.

particular interest or set of interests could acquire control of an undue proportion of the coal lands.

Under the leasing plan the government would maintain continual supervision not only over the method of operation and the sale of the product, but also of conditions of employment, wages, hours, and other details of practical operation. It would appear necessary, however, to place the leasing system in operation on the basis of a broad, well-defined principle of public policy and let modifications be made as experience justifies. For the present the federal government and the states should retain possession of their respective properties. Experience might show it to be advisable for the states themselves to administer the affairs of public coal lands within their borders, the federal government, however, retaining title in all land under territorial rule.

The above principle is the ideal one with respect to our public coal lands. Dr. Van Hise states it as his opinion that the government should never have disposed of any of its coal lands but should have operated them on the lease and royalty basis; he adds, however, "that is a question which it is useless now to discuss."[9]

2. The Federal Commission Plan.—A plan now being favored by a very respectable contingency for handling the great industrial corporations involves a federal commission having general supervisory functions without arbitrary power; or else a commission having a greater or less degree of authority to regulate capitalization, prices and operations.

We are concerned with such proposals only in so far as they affect the situation in hand. Would it be feasible to apply the commission idea to the railway and coal combine as *it now exists?* Passing over the confusion that would result from having a distinct federal commission supervise the operations of a combination one of whose factors is already subject to an interstate commission, it is believed that the commission would not only fail to solve the problem but would accentuate the evil by legalizing relationships that are responsible for the condition now existing, thus making the government a party to a scheme which would ultimately lead to absolute railway monopoly and the destruction of independent coal industry.

We do not hesitate to set up that no plan of regulation can be

9 Chas. R. Van Hise, The Conservation of Natural Resources, p. 42.

effective until the railways have been separated from the mining industry. It is contrary to public policy to place in the hands of a private corporation such a valuable franchise as that held by common carriers and *at the same time* attach to such franchise the ownership and operation of the most valuable mineral resources the country possesses—legalizing such joint monopoly by assuming the propriety of its existence in the very laws proposed. The profits accruing to interests which control the raw materials of a country are sufficiently great to attract capital and energy, and the profits from transportation, as apart from the business of producing or manufacturing, are likewise great. It would be a most unjust policy for a government to pass laws recognizing and permitting the combination in single heads of such vast and profitable interests as are involved in the control of our raw materials and our transportation franchises. It would mean the building up, under governmental sanction, of joint interests that would dominate our entire industrial system and would ultimately sweep every independent railway or mining concern into the business of joint operation.

We are to apply the proposal especially to the coal industry. Let us consider again the situation in the anthracite fields. About eighty per cent of the mines are controlled directly or indirectly by railway interests. The special advantages accruing to mines so controlled have enabled railways to extend their mining interests by absorbing properties not so related. It requires no argument to show that a railway-mining corporation will and does carry on the joint business of mining and transporting in a manner prejudicial to independent industry. The latter must join the monopoly or withdraw from the field. The plan in fact presupposes such joint monopoly and would operate to give legal sanction to a condition under which the independent could not exist. Railways, instead of controlling seventy or eighty per cent of the anthracite industry, would soon acquire one hundred per cent control, and would be protected by the government in such acquisitions as well as in profits accruing therefrom.

From these considerations it is very clear that the government could not consider the application of the commission plan to the situation as it now exists. Dissociation is fundamental; it must come first, and must be included in any wise program looking to the solution of the difficulty. In the past railway capital and railway energy and foresight have created the condition. We would

favor the absolute elimination of the railway as a direct or an indirect factor in the mining or the purchase and sale of coal and would give such administrative supervision to the redistribution and the continued operation of coal properties as would prevent the recurrence of such a contingency.

It is very improbable, if restrictive legislation be properly supplemented, that coal properties would again fall under monopoly control. The great industrial corporations became thoroughly established before the country was fairly aware of their existence and their plan of operation; before public sentiment had created a governmental policy; and before the government had perfected her machinery for dealing with them. It is very doubtful if any such illegitimate manipulations as characterized the earlier operations of corporations, could be repeated in an effort to evolve additional combinations. In the case of the coal industry it may be said that the proposed dissolution once effected, the government could restrain in its inception any scheme looking to the illegal combination of financial interests controlling the deposits.

If it is desired to assume that the government is incompetent to effect a bona fide dissolution, or to prevent such concerted action, of which we can not conceive but which has been assumed by some, we would seriously question the advisability of permitting the interests, guilty of operations and policies in contempt of the law, to continue ownership, under a commission or otherwise, of the natural resources affected. Especially would we oppose the adoption of a policy that would place the government in the attitude of succumbing to interests guilty of such violation, and of guaranteeing to such interests perpetual and monopoly profits from valuable franchises and natural resources which concern so vitally the industrial development of the country and the well-being of all citizens. Rather than submit to such a humiliating proposal and thus recognize the existence of a power superior to that of the government itself, it would be better for the state to condemn all coal properties and operate them on the lease and royalty basis as has been above suggested as the best method of handling state-owned coal properties.

It is another question as to whether the commission would be helpful in regulating the coal industry after the dissolution shall have been effected. The policy would then be purely one of administrative detail, and experience would doubtless demonstrate the advisability of an industrial commission one of whose func-

tions might be the supervision of the business of mining and dealing in coal. This duty could well be performed by a general commission exerting similar supervision over other industrial concerns.

President Charles R. Van Hise, of the University of Wisconsin, in an address before the American Mining Congress (Philadelphia, Oct. 22, 1913), looking at the question from the standpoint of the conservation of our coal supplies, favored an interstate trade commission equipped with broad powers similar to those possessed by the Interstate Commerce Commission, whose function it shall be to "regulate coöperation."

"Under the Sherman Act," said Dr. Van Hise, "there is no opportunity to limit output, divide territory, or regulate prices..... If the operators could agree upon limitation on output, and division of market so as to reduce freights, and could arrange for reasonable prices which would give them no more than their present profits, they would then be able to follow these principles (those of conservation) in mining their coal.....My proposal to remedy these conditions is neither regulated competition nor regulated monopoly, but retention of competition, prohibition of monopoly, permission of co-operation and regulation of the latter."[10]

Dr. Van Hise is doubtless correct in charging wasteful methods in the mining of coal, but the extent to which railroads and mine operators have already combined in the matter of the apportionment of tonnage, the allotment of facilities, and the setting of prices, indicates that the cause is not to be found in the ability of operators "to limit output, divide territory, or regulate prices." In fact, Dr. Van Hise recognizes the existence of coöperation when he says later in the same address, "Does it make any difference here in Philadelphia, the home of the anthracite, whether one buys coal of one dealer or another? It doesn't make any difference in the country cross roads either. The price is just the same from all dealers in the same locality." So far as the anthracite fields are concerned, railway control has been all-powerful, and the interests controlling the mines have worked so harmoniously that they have enjoyed most of the privileges that absolutely unlimited coöperation could afford. If this be true, some

10 The Dallas Morning News, Oct. 23, 1913; also The Conservation of Our Natural Resources, Chas. R. Van Hise, pp. 26-29.

other reason must be found for the wasteful methods employed in the mining of coal.

We are inclined to attribute the careless and wasteful methods to the simple economic principle that intensive methods, requiring a larger outlay for capital and labor, will not be employed so long as the cheaper method returns a larger profit than the more expensive method. When coal becomes less plentiful and the demand increases accordingly, the higher price paid will justify greater outlay for the re-opening of mines that have simply been skimmed of the surface deposits. It is doubtful if "regulated cooperation," which would appear to have the same meaning as "regulated competition," or "regulated monopoly," depending on the view point, would solve the problem of wastefulness. Unless direct legislation were feasible, it is a question that can not well be solved except through the natural operation of the law of supply and demand. The same problem is confronted in the wasteful methods employed in the cutting of timber, and even in the cultivation of the soil. Direct legislation would doubtless be helpful, but very hard to enforce; but indirect legislation, designed to effect savings in methods by regulating coöperation, or competition, would probably accomplish very little so long as the interests are in private hands and operated on the competitive principle.

3. **Amendments Necessary to Render Act Effective.**—In the light of the facts above set forth and the defects of the present statute as drawn and construed by the courts, it is apparent that amendatory legislation is necessary if the principle of dissociation is to be made effectual. To accomplish this result a statute should be enacted which will not only prohibit railways from the actual ownership and operation of coal mines, but which will effectually eliminate all the numerous devices to which railways have resorted in order to secure control of the coal industry. In order, therefore, to destroy the railway monopoly of the coal industry and to restore competitive conditions in this industry, it is proposed that the act entitled, "An act to regulate commerce," approved February fourth, eighteen hundred and eighty-seven, as heretofore amended, be amended, so as to contain, at an appropriate place, the following provisions, viz:

> I. That it shall be unlawful for any common carrier railroad company, subject to the provisions of this act, to own, control, or operate any coal lands or coal mines in

the territory served by it or connected directly or indirectly with its operations, except for its own fuel purposes;

II. That no officer, director, manager, trustee, employee, or receiver of any corporation, owning, controlling, or operating any coal lands or coal mines, or engaged in the business of producing, mining, or shipping coal, shall, while acting as such, act as an officer, director, manager, trustee, employee or receiver of any common carrier railroad company subject to the provisions of this act; provided that this section shall not be construed to apply to interests so far removed as to render any form of discrimination impossible;[11]

III. That no person, firm, or corporation, owning or holding, either directly or indirectly, the stock, bonds, or other evidences of indebtedness of any common carrier subject to the provisions of this act, shall, at the same time, own or hold, either directly or indirectly, any of the stock, bonds, or other evidences of indebtedness of any firm or corporation, owning, controlling, or operating any coal lands or coal mines, or engaged in the business of mining, producing, or shipping coal;[12]

IV. That no person, firm, or corporation, owning, controlling, or operating, any coal lands or coal mines, or engaged in the business of mining, producing, or shipping coal, shall, at the same time, own or hold any of the stock, bonds, or other evidences of indebtedness of any common carrier subject to the provisions of this act;[13]

V. That no common carrier railroad company, subject to the provisions of this act, shall expend any money, or incur any liability, or acquire any property, not in the operation of its railroad, or in the legitimate improvement, extension, or development, of its railroad;[14]

VI. That the preceding five sections shall be in force and effect from and after ———.[15]

11 This proviso might well be omitted since, on authority of Holy Church vs. U. S., 143 U. S. 457, the statute would not be construed to prohibit relationships from which no discrimination could possibly arise.

12 The same proviso appended to Section 2 may be here inserted.

13 Do.

14 Do.

15 The period for adjustment should be at least five years.

It is a question as to whether common carriers should be permitted to own and operate coal mines anywhere (except for their own fuel purposes), or hold stock in such mines, or indentify themselves in any way with any industry which does not contribute directly to their efficiency as common carriers. It is very clear that such relationships should not be permitted in the territory served by the railroad in question. It is equally clear that a railroad should not divert the stockholder's funds into any purely speculative enterprise either in its own territory or in any other. Such procedure would not only be unfair to stockholders but, which concerns our discussion more directly, would work a detriment to the railway by alienating financial support. Still another case might arise if a railroad should desire to make investments or assume obligations in sections of the country or in industries or securities over which its influence as a common carrier does not extend. How far may a railway properly go in investing funds held as a surplus or intended to be distributed in due time as dividends? Good financing requires that a corporation retain no "uninvested" funds beyond such as are necessary to meet current expenses and maintain the replacement fund and a sufficient reserve against emergencies.

The whole field of municipal, state, and federal securities should be open to railway investment. Under proper regulations, loans might safely be granted on the basis of real estate mortgages secured by property removed from the railway's region of influence. Other securities for railway investment could be designated, conditions being laid down under which certain industrial securities representing properties or interests not affected by the railway's favor or disfavor might be acquired. Such investments should be in accord with approved methods of railway financiering and should in no case be for the purpose of acquiring influence or control. As an additional safeguard, the privilege of voting stock should be withheld.

In order to make the statute logically applicable to the conditions which have appeared as well as to save it from being discounted before the courts in a possible test case representing in no sense the character of relationship which it is designed to prohibit, we have drawn the statute so as to restrict the prohibitory effect to "territory served" by it and to interests over which the railway has an influence on account of its function as a common carrier.

The reasons for the remaining sections appear on their face and are designed to remedy those defects in the existing statute which we have pointed out above.[16]

It is not maintained that railways and coal companies would not suffer some hardships in adjusting their affairs to this statute. It is believed, however, that a period of five years would be ample time for the railways to dispose of their coal properties on reasonable terms, and make such other adjustments as the situation would require. The term suggested may very reasonably be granted in view of the complexity of the relationships involved and the conditions under which they have been permitted to develop. In reply to those who prophesy disruptions and receiverships, we may refer briefly to other industries in which the principle of dissociation has been insisted upon and to the difficulties that have resulted in certain other fields from attempts to merge diverse interests and make them subject to a single directive head.

16 Chapter V, Section 1.

CHAPTER VI.

CONCLUSION.

I. Practical Applications.

1. New York Insurance Companies and Banking Interests.—The report of the Joint Committee of the Senate and the Assembly of the State of New York, appointed to investigate the affairs of life insurance companies, brought out the following facts: (1) That insurance companies were carrying on various businesses "foreign to the purposes of their organizations;"[1] (2) that some "have practically transacted the business of banks and trust companies," and in one case a restaurant,..... "through the control of subsidiary companies by means of stock ownership;"[2] (3) that they "have placed millions of dollars at the disposal of other companies through the maintenance of inactive deposit accounts at low rates of interest;"[3] (4) that the "large companies have freely furnished their support to numerous financial adventures through participation in the underwritings of syndicates;[4] and (5) that such participation was "given" (that is, the insurance companies would agree to take certain blocks of stock at the same rate paid by the syndicate manager if such stock could not be disposed of at the higher and regular price, it being understood, however, that all profits accruing from sales to others of the amount of stock so tentatively subscribed for by the corporations so favored, should be divided between the syndicate manager and the corporation) insurance companies, and under such circumstances "the dominant motive is to secure the good will and the favor of the company as a purchaser of securities rather than to get the protection of the company as an underwriter."[5]

1 Report of New York Committee (Assembly Report No. 41), appointed to investigate life insurance companies (submitted Feb. 22, 1906), p. 361.
2 Do. p. 381.
3 Do. pp. 381-382.
4 Do. pp. 382-383.
5 Do. pp. 382, 383.

The report also said that the testimony disclosed "flagrant abuses in connection with investments in real estate," many such purchases having been made "under the guise of procuring suitable accommodations for the transaction of business," and that such purchases were "not necessary in any proper sense for the use of the corporation."[6]

The conclusions of the committee are so pertinent to our subject that we can not do better than quote freely from them:

> "The dangerous tendencies," it declared, "of these practices are obvious. They have brought insurance companies into close relations with railroads, banks, trust companies, banking houses and the flotation of new enterprises, thus involving them in the manifold transactions of the financial world, not in their normal relation as creditors through suitable investments, but as co-owners of the corporations and promoters of the undertakings to which they have thus become allied. They have weakened the sense of official responsibility, multiplying the opportunity for gains, both direct and indirect, to officers and directors through the use of the companies' funds, and making easy the exercise of official discretion at the promptings of self-interest.
>
> "They were not incorporated to make money by speculation, by barter, by purchase or resale or by the development of industry. They should not attempt, and should not be permitted to attempt, to undertake by indirection that which may not be done directly under the provisions of their charter.
>
> "Investments in stock should be prohibited. They are fundamentally objectionable, as the corporation, instead of holding a secured obligation, acquires a proprietary interest in another business, with rights subject to all indebtedness which may be created in the conduct of it and often direct liabilities as stockholders.
>
> "If the stock holdings constitute a small minority, the investment is at the mercy of administrators chosen by the majority stockholders. If the stock interest be a large one, it is frequently found advisable to increase it until a substantial control is effected, and the insurance corporation is not only engaged in a different enterprise but directly undertakes its management.....Long ago the Prussian government refused admission to its jurisdiction of any insurance company investing in stocks, and the restriction has been found salutary and not burdensome. The Ger-

6 Report of New York Committee (Assembly Report No. 41), appointed to investigate life insurance companies (submitted Feb. 22, 1906), p. 379. A New York statute, Art. I, Sec. 20, forbade such acquisitions except "such as shall be required for the accommodation of its business."

mania, doing a large business in Prussia, has readily complied with its laws and the New York Life, which, with some reservations not publicly proclaimed, has professed compliance with the Prussian rule, has not been embarrassed in making its investments.

"It is entirely indefensible," continued the committee, "to permit one to act as the trustee of an insurance corporation in a transaction in which he may benefit, apart from his interest in the corporation, by the exercise of his discretion.....Whatever the immediate result of the proposed changes in their loss or gain, it is essential to their maintenance upon a sound basis that they should be freed from the alliance and practices which the testimony before your court has disclosed."[7]

The committee included in its report the following recommendations:

"(1) That no investment in the stock of any corporation shall be permitted, except in public stocks of municipal corporations.

"(2) That investments in bonds secured to the extent of more than one-third the value of the entire security therefor by the hypothecation of corporation stocks shall be prohibited.

"(3) That no loans shall be made upon stocks and bonds which are not the subject of purchase under the above provisions.

"(4) That every company now owning stocks or bonds of the prohibited classes shall be required to dispose of the same within five years from December 31, 1906, and each year prior thereto shall make a reduction of the amount of such investments to an extent approved by the Superintendent of Insurance.

"(5) The statute should also forbid all syndicate participations, transactions for purchase and sale on joint account, and the making of any agreement providing that the company shall withhold from sale for any time, or subject to the discretion of others, any securities which it may own or acquire.

"(6) It should also be provided that no officer or director should be pecuniarily interested either as principal, co-principal, agent or beneficiary in any purchase, sale or loan made by the corporation, except in case of a loan upon his policy."[8]

7 Report of New York Committee (Assembly Report No. 41), appointed to investigate life insurance companies (submitted Feb. 22, 1906), pp. 383-387.

8 Do. pp. 387, 388.

As a result of this report and the recommendations of the committee the legislature enacted the following amendment:

> "No domestic life insurance company.....shall after the 1st day of June, 1906, invest in or loan upon any shares of stock of any corporation, other than a municipal corporation, nor, excepting government, state or municipal securities, shall it invest in, or loan upon, any bonds or obligations which shall not be secured by adequate collateral security or where more than one-third of the total value of the collateral security therefor shall consist of shares of stock. Every such corporation which, on the first day of June, 1906, shall own any shares of stock other than public stock of municipal corporations whenever the same shall have been acquired, or any bonds or obligations of the kinds above described where said bonds or obligations shall have been acquired after the first day of March, 1906, shall dispose of the said shares of stock and of said bonds and obligations within five years from the thirty-first day of December, 1906, and in each year prior to the expiration of said five years shall make such reduction of its holdings of said securities as may be approved in writing by the Superintendent of Insurance. No investment or loan shall be made by a .y such life insurance corporation unless the same shall first have been authorized by the board of directors or by a committee thereof charged with the duty of supervising such investment or loan. No such corporation shall subscribe to or participate in any underwriting of the purchase or sale of securities or property, or enter into any transaction for such purchase or sale on account of said corporation jointly with any other person, firm or corporation; nor shall any such corporation enter into any agreement to withhold from sale any of its property, but the disposition of its property shall be at all times within the control of its board of directors. Any such corporation, in addition to other investments allowed by law, may invest any of its funds in any duly authorized bonds or evidences of debt of any city, county, town, village, school district, municipality, or other civil division of any state and may loan upon the security of improved unincumbered real property in any state worth fifty per centum more than the amount loaned thereon."[9]

Effect of New York Statute.—After a period of five years during which the law has been in operation, we may draw some conclusion as to the feasibility of this character of legislation. At

9 Amendment, 1906, Art. 2, Sec. 100, Laws of New York, Acts of Legislature, 129 Sess., Vol. I, pp. 797, 798.

the time of this investigation, the Mutual Insurance Company owned $16,234,000 shares (par value) of railway stock,[10] and securities of various other concerns. Stock holdings constituted 15.69 per cent, and real estate holdings, 6.59 per cent of the entire assets.

For the same period (1905) the business of the company was as follows: Assets, $470,861,166; premiums, $62,978,216; number of policies (new business), 88,971, amounting in premiums to $183,265,162; number of policies outstanding, 689,321; accruing from all policies, $1,589,549,468; expenses, $15,506,146; surplus, $78,267,607.[11]

For the calendar year 1911, after the statute had been in operation for five years, the financial status and business of the Mutual Life Insurance Company were as follows: Assets, $587,130,263 ($116,269,097 increase over 1905); premiums, $55,042,999 ($7,935,217 decrease); number of policies (new business) 55,678 (33,293 decrease), amounting in premiums to $139,534,566 ($43,730,957 decrease); number of policies outstanding, 671,053 (18,268 decrease); accruing from all policies, $1,504,974,662 ($84,574,806 decrease); expenses, $10,590,036 ($4,916,110 decrease); surplus, $102,059,174 ($23,791,567 increase).[12]

At the close of the calendar year 1911, the stock held by the Mutual had declined from 15.69 per cent of the assets, to 6.61 per cent; and the real estate, from 6.59 per cent of the assets, to 4.03 per cent.

Special attention need be called to but three items: first, the decrease in expense of operation by about 33 1-3 per cent, and only a slightly larger proportional decrease in new business; secondly, a substantial decrease in stock, and real estate holdings; thirdly, an increase in assets of 22.5 per cent; and fourthly, an increase in surplus of 34 per cent.

These facts furnish sufficient evidence that the insurance companies of New York are not hurt. Investigation of the other two great companies of New York, the Equitable and the New York Life, lead to practically the same conclusions: the companies are disposing of their stock interests and they are doing it without ap-

10 Report of New York Committee (Assembly Report No. 41), appointed to investigate life insurance companies (submitted Feb. 22, 1906), p. 30.

11 Compendia of Official Life Insurance Reports, compiled by the Spectator Co., New York (1905-1912), 1906 tables, pp. 14-17.

12 Do. calculated from tables, 1912, pp. 21-24.

parent sacrifice. In some respects their business has fallen off but the expense of operation has also been decreased, a condition indicating safer and saner methods of seeking new business[13] and greater economy in administration. Finally the continually increasing surplus insures a prosperous financial condition.

In spite of this showing, fearful prophecies were made as to the effect of requiring insurance companies to dispose of their stock. Paul Morton, referring especially to this proposal, stated before the legislative committee that it was the consensus of opinion among the great insurance authorities that, "if the bills to amend the General Insurance Law are enacted without certain changes, the interests of the insurance companies and policy holders of this state will suffer serious injury. Not only will the insurance companies be unable to conduct their business in such a manner as to produce fair returns to their policy holders, but the conservative insurance companies of other states will be forced to discontinue business in this state."[14]

The above testimony is typical of a large part of that presented before the committee; but the great insurance companies have continued in business and have prospered. Furthermore, insurance companies from other states have not been deterred from doing business in New York, twenty-three such "foreign" companies being now listed and competing with the eleven domestic companies.[15]

It should be emphasized that the plan of dissociation does not involve confiscation of property but simply a limitation of the field of business activity to that for which the corporation was organized. The field for legitimate work in the insurance business is just as large as it ever was. No prospects have been legislated out of existence. On the other hand an ever increasing number in New York and the entire country will look with more favor on the New York insurance companies now that safer and saner and more honest methods of doing business are being insisted upon. So also with the transportation companies and the

13 Note severe criticism of Committee of Investigation (Assembly Doc. 41, filed Feb. 22, 1906, pp. 34, 35, 80), of vast expenditures ($11,116,864 in 1904) and improper methods of publicity.

14 Hearings before legislative committee appointed to investigate the life insurance companies of New York, 1906, Vol. I, pp. 7a-7d.

15 54th Annual Report, Feb. 15, 1913 (Preliminary), Sup't of Insurance of New York, Table B, p. 47.

coal mines: The franchise rights and the property rights involved are not to be set aside; they are simply to be more clearly identified. The coal will remain in the mines under private control until the normal demand of the country justifies the operators in digging it out, and the same transportation companies will carry approximately the amount they are now carrying. The rebate, involved in the 65 per cent contract, would be eliminated; and the actual freight revenue from coal tonnage would, under the competitive system, be fully as large as under the present system where the carrier has frequently reduced transportation rates to affiliated mines in order to strengthen its monopoly of the coal trade and increase its profits in the coal business.

The plan which we have presented for dissolution is therefore not so radical as may appear on first consideration. It simply means that corporations engaged in the coal business must confine themselves to mining coal, and that corporations holding railway franchises must confine themselves to the railway business. This is no more than a return to the common law attitude toward all corporations as expressed above in the leading English case[16] on this subject. The courts in fact have seldom departed from this principle where the issue has been clearly presented.

2. Texas Cotton-Seed Oil Mills and Cotton Gins.—Our legislatures and departments of justice are coming to recognize the importance of limiting all corporations to certain functions clearly specified in their charters, and to discontinue the issuance of such charters as confer general authority to do a number of things, or specific authority to carry on several distinct lines of business. This is well illustrated in the position recently taken by Attorney General Looney, of Texas, relative to the entrance of cotton seed oil mills into the ginning business. In a letter to all oil mills so engaged, the Attorney General said:

> "We find that a number of charters for oil mills, heretofore filed, included as one of the purposes the ownership and operation of gins as well as the manufacture of oil. This, in our opinion, was unauthorized and these charters expressing a dual purpose should never have been filed, but having been filed without authority of law, will not legalize that which was wholly unauthorized by any statute.
>
> "We also understand that the custom has grown up generally among cotton oil mills to own and operate gins as a means doubtless of controlling the seed supply.

16 Chapter I, Section 2, European Railways and the Coal Industry.

"As it is our opinion that the ownership and operation of gins and ginning for the public by cotton-seed-mill corporations constitute a misuse of the means and assets of such corporations, it becomes our duty to insist that cotton-seed-oil mills, incorporated as such, shall divorce themselves from the ownership and operation of the ginning business, otherwise this department will be forced to seek a forfeiture of the charters of any such that do not, within a reasonable time, strip themselves of this class of property.

. . . . . .

"Recent investigation made by this department reveals the fact that a great number of cotton-seed-oil corporations are dealing in bagging and ties; that is to say, they are buying and selling bagging and ties as merchants. For the same reason as stated above, oil-mill corporations are not authorized by law to engage in the mercantile business. . . . . .

"Another complaint that comes to this department is that, in many localities, there exist arrangements between the cotton-seed-oil mills and the ginners or buyers whereby the ginners or buyers are to purchase cotton seed from the farmers at prices named by the mill man (the mill prices to be maintained), the mill paying the ginner a certain commission or a margin or compensation, the net result being that competition is destroyed and the market price of cotton seed in the respective communities controlled."[17]

In the Texas case the situation is very similar to that presented by the railway-coal combine. Where the mills are not able to secure absolute control of the gins, numerous cases have appeared where virtual control has been acquired by agreements under which the latter turn over to the former the cotton seed at prices set by the mills, the ginner simply receiving a commission for this service. This scheme seems comparable to the 65 per cent contracts by which railways acquired dominant influence over such coal mines as could not be controlled through stock ownership.

3. The New Haven System: Trolley Lines, Steamship Lines, and Other Railways.—It is not only that such joint operation of diverse interests tends to monopoly by a process of elimination of concerns acting independently, but that, where two different industries are under a single administrative policy, the

17 Letter of Attorney General of State of Texas, Nov. 5, 1913.

development of one at the expense of the other, or else the failure to properly administer the diverse interests involved, is very apt to result. This has been shown to be true in the railway-coal combines, and again in the case of the New York, New Haven and Hartford Railway. The Interstate Commerce Commission, after making very careful investigation into the financial operations of the New Haven and its relation to the transportation system of New England, said, "No student of the railway problem can doubt that a most prolific source of financial disaster and complication to railroads in the past has been the desire and ability of railroad managers to engage in enterprises outside the legitimate operation of their railroads." The Commission recommended, therefore, that "every interstate railroad should be prohibited from expending money or incurring liability or acquiring property not in the operation of its railroad or in the legitimate improvement, extension, or development of that railroad."[18]

The Commission also took the position that the New Haven should divest itself of all trolley-line affiliations, since the control of such lines in cities served by the railway "effectively prevents the construction of other lines which would.....produce a competing system.....Public interest requires that these three forms of transportation (railways, trolleys and steamships) should be kept distinct, so that each may operate in its own sphere."[19]

On the day following the publication of this report, Interstate Commerce Commissioner McChord, who had in charge the investigation of the wreck on the New Haven lines, attributed the disaster to faulty management, faulty equipment, and an inexperienced engineer.[20] Throughout the Commission's report of this disaster there are intimations that such a condition has been permitted to exist because the officials were so overburdened with a complexity of interests that they were unable to administer any one with a clear vision.[21]

Commissioners Clements and Marble, in concurring in the first report above mentioned, said, relative to the evils of combining separate and distinct systems (Boston and Maine and the New Haven), "They are not one system, but two systems under one

18 27 I. C. C. 616.
19 Do. 619.
20 June 12, at Stamford, Conn., Preliminary Report, June 13, 1913.
21 Full Report of I. C. C., July 7, 1913.

management.....We would give weight to the suggestion that the merger has so overloaded the executive heads of the entire aggregation as to impair, not only correct and economical financial administration, but also efficiency and safety of operation. .....Therefore closer superintendence with corresponding gains in efficiency and safety, might be expected from a dissolution of the merger."[22]

Although this particular part of the report has to do with two railroads, it is made very clear that the interests of the two roads and the conditions of operation are so different that successful management of both could not be centered in a single administrative head. The first year of New Haven management was said by the Commission to have been "the most disastrous in the history of the road" (that is, the Boston and Maine), the latter having degenerated from the most successfully operated road in New England, both with respect to services and the payment of dividends, to the verge of insolvency.[23]

The New Haven seems to have made a very earnest effort to restore the efficiency and the financial status of the Boston and Maine, but with only partial success. The policy toward employees, improvements, and other matters of detail, on the Boston and Maine, although having some admirable features, was in many respects misdirected owing to a failure to understand existing conditions.[24] A policy which may give entire satisfaction under certain conditions may fail absolutely when applied to a similar industry under different conditions. If the interests are utterly diverse, however, it is much more difficult for a single management to develop to the best advantage the individual interests so joined.

As a result of conferences between the Attorney General of the United States and President Elliott of the New Haven, it is announced in the current press that the New Haven will relinquish control of the Boston and Maine, all its trolley lines, the Merchant's and Miner's Transportation Company, the Eastern Steamship Company, and the Maine Steamship Company.[25] It is understood that the Department of Justice was prepared to bring

22 27 I. C. C. 617.
23 Do. 595.
24 Do. 594-597.
25 Literary Digest, Jan. 24, 1914.

suit under the Sherman Law if some satisfactory adjustment could not be reached. In a similar manner other interests that have long been merged are effecting dissolutions without the necessity of court procedure.

4. The American Telegraph and Telephone Company and the Western Union.—As given out in a public statement, "(1) The American Telegraph and Telephone Company will dispose of its entire holdings of stock in the Western Union Telegraph Company in such a way that the control and management of the latter will be entirely independent of the former and of any other company in the Bell system.

"(2) Neither the American Telegraph and Telephone Company nor any other company in the Bell system will hereafter acquire control over any other competitive line of exchange."[26]

This announcement followed very closely upon the recommendations of the Postmaster General advising the nationalization of these facilities as a part of the postal system. This, together with the activity of the Department of Justice, is doubtless largely responsible for the act of dissociation.

5. Withdrawal of Individual Members of Morgan Firm from Directorships.—Early in January it became known that individual members of the firm of J. P. Morgan and Company were planning to withdraw their membership from a number of important directorships. It was later announced that either J. P. Morgan or some individual member of the firm had withdrawn from the New York Central, the New York, New Haven and Hartford, the United States Steel Corporation, the American Telegraph and Telephone Company ,and the Western Union Telegraph Company. The current press states, however, that all directorships in the First National Bank and the National City Bank of New York have been retained, and that the community of interests between these two banks, the Morgan banking house, and the great banking house of Kuhn, Loeb and Company, remains unimpaired.[27] It is understood that other withdrawals are to come in the near future.

II. Conclusions.

Although a public demand for the dissociation of diverse in-

26 Literary Digest, Jan. 3, 1914.
27 Do. Jan. 17, 1914.

terests has only arisen in very recent years, it has already extended to a large number of industries, including insurance companies and numerous other industrial concerns and banking interests; cotton-seed-oil mills and cotton gins; railways and steamship and trolley lines; telegraph and telephone companies; and railways and coal mines. Our state and federal authorities are turning to the principle of dissociation as the most effectual means of restoring competitive conditions among the interests involved. The philosophy is sound and the legal authority is absolutely unquestioned. The situation resolves itself into this: The merging of diverse interests, whether railroad and coal mine, or other, will invariably place at a disadvantage those interests that are not so joined, and this will enable the former to undersell and, ultimately, to force out the latter. This tends ultimately to monopoly control by the corporation possessing the advantage. The principle is true with respect to any two industries that are complementary in their nature. It is doubly true where one of the factors of the merger is a transportation company and the other produces goods to be shipped. The situation which the merger of the transportation industry and the coal industry has produced, presents in its most aggravated form the injustice and danger of permitting diverse yet dependent interests to unite. It is only through the absolute dissociation of such interests that we may reasonably hope to give independent industry a fair opportunity for development and prevent the ultimate railway monopolization of those industries into which the railway may choose to enter.

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15. Report of Joint Committee of Senate and General Assembly, of State of New York, appointed to investigate Life Insurance Companies, Assembly Report 41, 129 Sess.

16. Report of Senate Select Committee on Interstate Commerce, S. Report 46, 49th Cong., 1st Sess. (This report led up to original I. C. Law.)
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18. Report of I. C. C. on coal situation in Western Bituminous Fields, S. Doc. 450, 60th Cong., 1st Sess.
19. Report of I. C. C. on the receivership of Western Maryland, S. Doc. 465.
20. Report of Senate Committee on Interstate and Foreign Commerce, re S. Res. 98, 62d Cong., 2d Sess.

B. Senate Resolutions, Bills, etc.

1. S. Res. March 18, 1885, 48th Cong., Spec. Sess., to appoint Select Committee to investigate subject of regulation of transportation, etc.
2. S. 1093 and 1532, 49th Cong., 1st Sess., the Cullom bills, the second of which became original I. C. Law.
3. S. Res. 72, 59th Cong., 1st Sess., fixing the date to vote upon act to amend an act to regulate commerce and all acts amendatory thereof, and to enlarge the powers of the I. C. C.
4. S. Res., 59th Cong., 1st Sess., by R. M. Lafolette, that President request the I. C. C. to investigate the elevator and grain buying and forwarding business to determine to what extent favors have been granted, etc.
5. S. Res., 48, 60th Cong., 1st Sess., by B. R. Tillman, instructing Att'y Gen'l to institute certain suits in equity and law regarding the conveyance and title of lands granted in aid of railroad and telegraph construction, etc. Amended and passed.
6. S. Joint Res. 32 (Public Res. 8), 59th Cong., 1st Sess., instructing the I. C. C. to make examination into the subject of railroad discriminations and monopolies in coal and oil, and report on the same from time to time. Approved March 7, 1906.
7. Public Res. 11, 59th Cong., 1st Sess., J. Res., amending joint resolution instructing I. C. C. to make examination into the subject of railroad discriminations and monopolies. Approved March 21, 1906.
8. S. 1242, Individual Reports re railways and the coal business of members of I. C. Committee in reporting Hepburn Rate Bill to Senate.
9. S. Doc. 256, 59th Cong., 1st Sess., Message from the President of the U. S. relative to the J. Res. instructing the I. C. C. to make examination into the subject of railroad discriminations and monopolies in coal and oil.
10. S. Doc. 522, 59th Cong., 1st Sess., stating in response to S. Res. 128, that a Detailed Report on Findings of Fact and its conclusions thereon in regard to the subject now under investigation or already investigated under J. Res. 32, etc., for

reasons set forth, can not now be made, but will be prepared and submitted without any unnecessary delay.

11. S. Doc. 465, 60th Cong., 1st Sess., Letter of Chairman of Commission re postponement of effectiveness of Commodities' Clause.
12. S. J. Res. 74, 60th Cong., 1st Sess., to postpone effectiveness of statute.
13. S. 3625, 61st Cong., 2d Sess., by Francis G. Newlands, providing for the appointment of an Inland Waterways Commission, and for the improvement and development of the inland waterways of the country, etc.
14. S. 3720, 61st Cong., 2d Sess., by Francis G. Newlands, for the formation of national corporations for railroads and navigation lines engaged in interstate commerce.
15. S. Res. 177, 60th Cong., 1st Sess., by J. B. Foraker, that the I. C. C. inform the Senate whether the railroads engaged in interstate commerce have, since May 1, 1908, complied with the Commodities' Clause. Res. agreed to.

C. House Resolutions, Bills, etc.

1. H. R. 12654, 50th Cong., 2d Sess., to prevent the combination of carrying interstate commerce with other business (referred to labor troubles in Penn.).
2. H. R. 77, 59th Cong., 1st Sess., declaring certain cars used in the transportation of articles of interstate and foreign commerce carriers, and prohibiting an ownership in or control over them by shippers.
3. H. R. 216 and 254, 59th Cong., 1st Sess., declaring all persons or associations of persons, joint stock companies or corporations owning or operating private cars in interstate commerce to be common carriers subject to the act to regulate commerce.
4. H. R. 12987 (the original Hepburn Bill), to amend the act to regulate commerce, 59th Cong., 1st Sess.
5. H. R. 15262, 59th Cong., 1st Sess., to prevent common carriers engaged in interstate commerce, or any director, officer, agent, receiver or operating trustee thereof, directly or indirectly from having any control or part ownership or interest in, or prosecuting or engaging in the business of mining or manufacturing or trading in any commodity transported by such carriers.
6. H. Res. 125 and 157, 59th Cong., 1st Sess., both relative to combinations between the Penn. and other coal roads.
7. H. J. Res. 115, 59th Cong., 1st Sess., amending joint resolution 32, re investigation coal, by including oil. Passed.
8. H. Res. 260, 59th Cong., 1st Sess., re certain coal carrying roads.
9. H. Res. 644, 59th Cong., 2d Sess., directing the Secretary of Commerce and Labor to report to the House certain informa-

tion relative to the operating of railways by the governments of France, Switzerland, and Belgium.

D. Congressional Records, 1870-1912; Congressional Globe, 1869-1870, pp. 234, 868.

E. Cases Cited.

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3. Lehigh Valley R. R. vs. Coxe, 3 I. C. R. 460 (1891).
4. "Minnesota Rate Case," 5 Fed. Rep. 184.
5. Munn vs. Ill., 94 U. S. 113, re federal and state jurisdiction.
6. N. Y., N. H. & H. vs. C. & O. R. R., 200 U. S. 361, re railway transactions in coal.
7. Pullman Palace Car Co. vs. Mo. Pac. R. R., 115 U. S. 587, re bona fide relationship.
8. Reading R. R. Co. vs. State of Penn., 15 Wal. 232.
9. Red Rock Fuel Co. vs. B. & O. R. R., 2 I. C. R. 812.
10. Stockton, Attorney General vs. Central R. R. of N. J. et al., 50 N. J. Eq. 52.
11. Wabash Railway vs. Ill., 118 U. S. 557, re federal and state jurisdiction.
12. U. S. vs. D. & L. Co., Erie R. R. Co., Central R. R. Co. of N. J., Penn. R. R. Co., Lehigh Valley R. R. Co., 213 U. S. 257, leading case on Commodities' Clause.
13. U. S. vs. D. L. & W. R. R., pending.
14. U. S. vs. Lehigh Valley R. R. Co., 220 U. S. 257, reversing judgment of Circuit Court for E. D. of Penn., re filing amended bill.
15. U. S. vs. Reading Co. et al., pending.
16. U. S. vs. D. & H., for hauling hay for own use; pending.
17. U. S. vs. D. L. & W., do., pending.

F. Court Documents.

1. Record in U. S. vs. P. R. R. R. Co. et al., Ct. E. D. Pa., Apr. Sess., 1907, filed in S. C., Oct. Term, 1910 (Nos. 198, 206, 217).
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3. Before House Committee on Interstate and Foreign Commerce, H. R. 4072, 58-2; 51-1, 4095.
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7. Before Joint Committee of Senate and Assembly of the State of New York, appointed to investigate affairs of Life Insurance Companies, 1906, Vols. I and II, 129 Sess.
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2. Pennsylvania Constitution, Art. XVII, Sec. 5.

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5. Wisconsin Stat., "Potter Law" of 1874, Laws of Wis., Compilation, p. 599.
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